95-1441

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

LINDA J. BLESSING, Director, Arizona Department of Economic Security, in her official capacity,

Petitioner,

v.

CATHY FREESTONE, *et al.*,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether custodial parents seeking child support from noncustodial parents can sue state officials under 42 U.S.C. § 1983 for alleged violations of Title IV-D child support program agreements between the States and the federal government when such suits will contravene this Court's precedents, not necessarily remedy a custodial parent's grievances, and violate core principles of federalism and separation of powers?

PARTIES TO THE PROCEEDING BELOW

Petitioner Linda J. Blessing, Director of the Arizona Department of Economic Security (hereinafter "State Director"), has succeeded Charles E. Cowan, who held that position during the proceedings below.

Respondents Cathy Freestone, Susan Harrington, Sonya Madrid, Judith Rogers, and Esperanza Laustaunau (hereinafter "Plaintiffs") are proposed class representatives who filed the underlying action individually, on behalf of their minor children, and on behalf of all others similarly situated.

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PETITION FOR WRIT OF CERTIORARI

The State Director respectfully petitions for a writ of certiorari to review the judgment entered by the United States Court of Appeals for the Ninth Circuit in this proceeding.

OPINIONS BELOW

The court of appeals opinion is reported at 68 F.3d 1141. Appendix ("App.") A. The judgment of the United States District Court for the District of Arizona granting summary judgment in favor of the State Director and against Plaintiffs is not reported. App. B.

STATEMENT OF JURISDICTION

On October 12, 1995, the court of appeals entered the judgment from which review is sought. App. A. On December 12, 1995, the court denied rehearing. App. C. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS

This matter involves the following statutory and regulatory provisions:

42 U.S.C. § 1983, which provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia,

> subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

The pertinent text of Titles IV-A and IV-D of the Social Security Act, 42 U.S.C. §§ 601-617 and 651-669, and the associated regulations, namely 42 U.S.C. §§ 602(a)(27), 603(h), and 652, and 45 C.F.R. §§ 302.33, 305.20(a)(3), and 305.99, are reproduced in Appendices D and E.

STATEMENT OF THE CASE

The court of appeals decision authorizes over three million custodial parents residing throughout the Ninth Circuit to sue state officials to enforce federal regulations governing the States' receipt of federal funds to operate state child support enforcement programs pursuant to Title IV-D of the Social Security Act. In opening this floodgate of potential litigation, the court of appeals acknowledged that its decision squarely conflicts with decisions of the Sixth and Eleventh Circuits. App. 10-11a. The decision also conflicts with this Court's decisions by, among other things, dispensing with the fundamental elements of standing required by Article III of the Constitution and ignoring the principle of unambiguous notice of conditions on the grant of federal funds underlying *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1 (1981), and *Suter v. Artist M.*, 503 U.S. 347 (1992). Finally, the decision thwarts the purposes behind § 1983 and Title

IV-D, and undermines the core principles of federalism and separation of powers. For these reasons, the decision below cries out for review by this Court.

Statutory Background

Title IV-A of the Social Security Act governs the federal Aid to Families with Dependent Children ("AFDC") program. 42 U.S.C. §§ 601-617. In 1975, Congress amended Title IV-A to require that States, as a condition of receiving AFDC funds, adopt state plans to provide child support collection services. 42 U.S.C. § 602(a)(27). At the same time, Congress enacted the Child Support Enforcement Act as Title IV-D of the Social Security Act, which established (i) the requirements that States must meet in creating and administering child support enforcement plans (including establishment of paternity, location of absent parents, establishment and enforcement of child support orders, and collection of child support arrears) and certain spousal maintenance support and medical support plans (collectively "child support enforcement"), and (ii) the duties that the Secretary must fulfill in monitoring such plans. 42 U.S.C. §§ 651-669.

Congress did not explicitly or implicitly authorize a private right of action to enforce the provisions of these acts. To the contrary, Congress expressly granted enforcement authority to the Secretary of the United States Department of Health and Human Services ("Secretary"), who is charged with regulating and auditing each participating State's Title IV-D program to ensure compliance with the statutory schemes. 42 U.S.C. § 652. Congress also

authorized the Secretary to impose a fiscal penalty of up to five percent of the federal funding for a State's AFDC program if a State failed to develop a child support enforcement plan that complied with federal laws and regulations. 42 U.S.C. § 603(h).

Since 1975, Title IV-D and its associated regulations have undergone substantial changes that have significantly expanded the States' responsibilities. States now must provide Title IV-D services not only to custodial parents who receive public assistance, but also to those who do not. *See* 42 U.S.C. § 654(6); 45 C.F.R. § 302.33(a). The statutes and regulations governing the Secretary's audits of state programs also have undergone substantial change. Originally the federal government required States to be in "full compliance" with specified criteria to remain eligible for federal funding. *See* 41 Fed. Reg. 55,345-47 (1976). In 1984, Congress reduced the standard that States must satisfy in federal audits of their Title IV-D programs from "full compliance" to "substantial compliance" (or 75% compliance). 42 U.S.C. § 602(a)(27); 45 C.F.R. § 305.20(a)(3).

In 1975, the State of Arizona designated the Arizona Department of Economic Security ("ADES") as its Title IV-D agency and adopted a child support enforcement plan, which the federal government approved. Arizona's plan, like that of every other State, has been audited routinely by the Secretary for substantial compliance at least once every three years. 42 U.S.C. § 652(a)(4). If a State fails an audit, the statutory and regulatory scheme provides the State with an opportunity to cure the deficiency. *See* 42 U.S.C. § 603(h)(2)(A); 45 C.F.R. § 305.99. In response to a 1989 federal audit that identified certain

deficiencies, Arizona submitted a corrective action plan. *See* Defendant's Motion to Dismiss Plaintiffs' Complaint, Ex. A-1. The follow-up audit that the Secretary conducted after Arizona implemented its new plan found that Arizona had achieved "substantial compliance."

Proceedings Below

On February 22, 1993, Plaintiffs filed a class action complaint in the United States District Court for the District of Arizona seeking declaratory and injunctive relief under 42 U.S.C. § 1983. App. 7a. Plaintiffs did not claim money damages. The district court exercised jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343.

The five named Plaintiffs represent a proposed class of about 300,000 custodial parents in Arizona who are eligible to receive child support enforcement services from ADES under Title IV-D.[1] The proposed class includes parents who receive AFDC benefits as well as those who do not.

Plaintiffs asked the court to declare that the operation of Arizona's child support enforcement program violated rights that Title IV-D and its implementing regulations had created on their behalf and that they could enforce these rights in a § 1983 action. They also asked the court for a permanent injunction with continuing supervision to achieve and sustain substantial compliance with Title IV-D.

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[1] The Complaint alleged in 1993 that approximately 275,000 Title IV-D cases existed. The Secretary's published figures for 1994 put the number at 307,060 open case files. (*See* n.9, *infra*.) The number fluctuates constantly as ADES closes existing cases and new custodial parents request services.

The State Director filed a motion to dismiss, which the district court treated as a motion for summary judgment. App. 4b. The district court granted summary judgment in favor of the State Director and against Plaintiffs, relying upon the reasoning in *Carelli v. Howser*, 923 F.2d 1208 (6th Cir. 1991), that Congress had foreclosed a private judicial remedy in Title IV-D. Plaintiffs appealed to the Ninth Circuit pursuant to 28 U.S.C. § 1291.

A divided panel of the court of appeals reversed the district court's decision. The majority acknowledged the considerable tension between the approach that this Court took in *Wilder v. Virginia Hospital Ass'n*, 496 U.S. 498 (1990), and the analysis that it applied in *Suter v. Artist M.*, 503 U.S. 347 (1992). App. 12a. The panel also candidly recognized that "federal courts have splintered on the question of whether a § 1983 action is available to enforce Title IV-D." App. 2a. The majority nevertheless held that Title IV-D confers broad rights upon all custodial parents seeking child support to enforce state officials' compliance with federal requirements through the vehicle of § 1983.

Judge Kleinfeld dissented. In attempting to reconcile *Suter* and *Wilder*, he concluded that this case is closer to *Suter*. He found the "substantial compliance" standard to be inconsistent with the creation of an "unambiguous" right of any individual to enforce Title IV-D. Indeed, he argued that, unlike the case[2] in which the First Circuit held that § 1983 was available to enforce Title IV-D where

[2] *Albiston v. Maine Comm'r of Human Servs.*, 7 F.3d 258 (1st Cir. 1993).

the plaintiffs' claims were narrower and designed to obtain immediate monetary relief, the enforcement action in this case was "designed to change social policy, not to get something for a client." App. 44a. Accordingly, he concluded that it was completely "speculative" whether Plaintiffs would receive any "concrete benefit" from a declaration that state officials were not fulfilling their federal responsibilities under Title IV-D.

REASONS TO GRANT THE PETITION

It is difficult to imagine a case more worthy of review by this Court. The legal theory underlying § 1983's proper role in enforcing federal statutory and regulatory obligations is in disarray. The judicial task of reconciling *Suter* and *Pennhurst* with *Wilder* and *Wright v. Roanoke Redevelopment & Housing Authority*, 479 U.S. 418 (1987), can authoritatively be undertaken only by this Court. The present doctrinal vacuum explains the dizzying array of conflicting approaches to deciding whether Title IV-D can be enforced through § 1983. Moreover, the decision under review exposes officials in the States of Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington to § 1983 claims by more than three million custodial parents seeking child support. The time has come for the Court to decide the general availability of § 1983 to enforce federal nonconstitutional rights and the specific availability of § 1983 to enforce the regulations implementing Title IV-D in actions against state officials.

1. Decisions of the Circuit Court of Appeals Are in Hopeless Conflict, and the Rationales of the Various Lower Court Decisions Are Splintered.

Certiorari is warranted to resolve the immediate and acknowledged conflict among the circuits on the precise Title IV-D issue presented in this case.

Several decisions of the court of appeals conflict. The Sixth and Eleventh Circuits have refused to allow private § 1983 actions to enforce Title IV-D. *See Carelli v. Howser*, 923 F.2d 1208, 1211, 1213-16 (6th Cir. 1991) (holding that Title IV-D created enforceable rights in the class of parents eligible for child support enforcement services, but concluding that Title IV-D's comprehensive audit scheme foreclosed private enforcement); *Wehunt v. Ledbetter*, 875 F.2d 1558, 1565-66 (11th Cir. 1989) (holding that Title IV-D did not create enforceable rights in proposed class of custodial parents because Congress did not enact Title IV-D to benefit such parents by providing legal assistance, but to benefit society as a whole by facilitating recoupment of welfare payments and reduction of welfare roles), *cert. denied sub nom. Brown v. Ledbetter*, 494 U.S. 1027 (1990). The Ninth Circuit opinion at bar joins decisions by the First and Eighth Circuits that have allowed private causes of action against state officials. *See Albiston v. Maine Comm'r of Human Servs.*, 7 F.3d 258, 269 (1st Cir. 1993) (holding that Title IV-D created enforceable rights in plaintiff class to receive "pass-through" and "gap" payments from the State's child support collections within time frames that Titles IV-A and IV-D and their implementing regulations established); *Howe v. Ellenbecker*, 8 F.3d 1258, 1262-63 (8th Cir. 1993) (holding that Title IV-D created enforceable rights to child support

enforcement services in class of custodial parents whose children's absent parents lived on Indian reservations and affirming order that state and federal governments negotiate cooperative agreement permitting provision of such services with Indian tribes in question), *cert. denied*, 114 S. Ct. 1373 (1994).

The rationales of these opinions and those by district courts and a state court of last resort splinter into several categories. Indeed, the majority panel openly acknowledged that "there is a three-way split of authority as to the availability of a § 1983 action to enforce Title IV-D": (i) no enforceable rights exist under Title IV-D;[3] (ii) an enforceable right exists, but the comprehensive enforcement scheme precludes a § 1983 action;[4] and (iii) a private

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[3] *Wehunt*, 875 F.2d at 1565-66; *see also Mason v. Bradley*, 789 F. Supp. 273, 276-77 (N.D. Ill. 1992) (declining to find that Title IV-D created enforceable rights to timely provision of child support enforcement services to individual plaintiff because Title IV-D required only substantial compliance and therefore did not mandate that every applicant be provided with prompt service); *Oliphant v. Bradley*, No. 91-C-3055, 1992 U.S. Dist. LEXIS 8975 (N.D. Ill. Feb. 19, 1992) (ruling that Title IV-D did not create enforceable rights to effective, prompt child support enforcement services in all AFDC recipients because Title IV-D did not impose binding obligations on the States in that a State's participation in the AFDC program was voluntary, Title IV-D's 75% compliance standard did not require a State to provide optimal services to each AFDC recipient, and the Secretary's broad oversight responsibilities demonstrated congressional intent to foreclose private enforcement of Title IV-D).

[4] *Carelli*, 923 F.2d at 1210-11, 1213-16. Interestingly, Tennessee is located in the Sixth Circuit, yet its highest court's decision on this federal question conflicts with the Sixth Circuit's decision. *See Davis v. McClaran*, 909 S.W.2d 412, 420

cause of action exists under § 1983 to enforce Title IV-D.[5] App. 10-11a. Thus, the conflict and confusion on this important federal question become hopeless to resolve without review by this Court.

In this case, two federal judges (the court of appeals majority) would allow a private right of action, whereas two other federal judges (the dissenter and the district court judge) would not. Given the massive consequences – as many as 300,000 potential new litigants in Arizona alone, the inevitable judicial appointment of a Special Master to duplicate the oversight of the Secretary, and the tremendous diversion of scarce public resources from the task of delivering services – this Court should give direction to the Ninth Circuit and other courts.

(Tenn. 1995) (holding that Title IV-D created an enforceable right to child support enforcement services in class of custodial parents and that parents could bring individual actions to enforce a State's "direct obligations" to them under Title IV-D regardless of whether the State was in substantial compliance with Title IV-D for audit purposes), *petition for cert. filed*, 64 U.S.L.W. 3519 (U.S. Jan. 25, 1996) (No. 95-1190).

[5] *Howe*, 8 F.3d at 1263; *Albiston*, 7 F.3d at 269; *see also King v. Bradley*, 829 F. Supp. 989, 996-97 (N.D. Ill. 1993) (holding that because Title IV-D did not create an enforceable right to receive any payments per se, but only created an enforceable right to receive services from a program that followed federally required procedures in at least 75% of cases, custodial parents could state claim for injury caused by loss of opportunity to receive child support or "pass through" payments only if State agency failed to achieve 75% compliance level); *Behunin v. Jefferson County Dep't of Social Servs.*, 744 F. Supp. 255, 257-58 (D. Colo. 1990) (holding that Title IV-D created an enforceable right to proper accounting for and distribution of court-ordered child support payments in the plaintiff class).

The Court now has two petitions pending before it that raise this important federal question: this one and Tennessee's in *McClaran v. Davis*, No. 95-1190. Now that this important question of federal law is being raised with increasing frequency and being decided in conflicting ways, it is critical for this Court to resolve it.

2. The Court of Appeals Opinion Conflicts with Relevant Decisions of This Court.

This Court's approach to deciding whether a federal statute – let alone a federal regulation – creates a right "enforceable" through 42 U.S.C. § 1983 has been in a state of flux. *Compare Wilder with Suter.* Nevertheless, a number of bedrock principles support the State Director's position in this case.

First, when Congress, acting pursuant to the Spending Clause, imposes a "condition on the grant of federal moneys" – and liability to private suit for failure to comply with the federal requirements certainly is such a condition – then Congress must impose the condition "unambiguously." *Pennhurst*, 451 U.S. at 17. By holding that a custodial parent may bring a 42 U.S.C. § 1983 action against Arizona officials to enforce Title IV-D statutes and regulations, the court of appeals has imposed a condition on Arizona that was neither unambiguously clear in the congressional language nor intended by Congress.[6] The decision thus conflicts with this Court's

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[6] Congress passed Title IV-D of the Social Security Act pursuant to the Spending Clause. *See* U.S. Const. Art. I, § 8, cl. 1; *cf. Helvering v. Davis*, 301 U.S. 619, 640-44 (1937).

decisions holding that conditions imposed upon a State under the Spending Clause are not enforceable under § 1983 unless they are unambiguously clear. *Id.; South Dakota v. Dole*, 483 U.S. 203, 207 (1987); *Suter v. Artist M.*, 503 U.S. at 356.[7]

Because Title IV-D imposes upon States an obligation to do no more than substantially comply with federal requirements and imposes upon federal regulators an obligation to ensure substantial compliance, Title IV-D does not "unambigously confer" enforceable rights upon any individual. The court of appeals, however, relied primarily on the regulations in 45 C.F.R., Part 303 to

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[7] Congress recently amended part A of Title XI of the Social Security Act. The amendment states that in all pending and future actions

> brought to enforce a provision of the Social Security Act, such provision is not to be deemed unenforceable because of its inclusion in a section of the Act requiring a State plan or specifying the required contents of a State plan. This section is not intended to limit or expand the grounds for determining the availability of private actions to enforce State plan requirements other than by overturning any such grounds applied in *Suter v. Artist M.*, 112 S. Ct. 1360 (1992), but not applied in prior Supreme Court decisions respecting such enforceability; provided, however, that this section is not intended to alter the holding in *Suter v. Artist M.* that section 471(a)(15) of the Act is not enforceable in a private right of action.

42 U.S.C. § 1320a-2. Thus, Congress overturned only the portion of *Suter* that departed from this Court's prior precedent: the portion of *Suter* in which the Court found that the only enforceable right under a statute requiring a state plan is a right to the plan itself. Congress did not attempt to overrule *Suter* to the extent that *Suter* followed *Pennhurst*.

support its finding that Arizona had notice of the requirements for compliance with Title IV-D. The Part 303 regulations, which require compliance "in all cases," contradict the controlling statute, 42 U.S.C. § 602(a)(27), which requires only "substantial" compliance to avoid enforcement action by the Secretary.[8]

Second, creating enforceable rights that are not intended by Congress but are based solely upon regulations gives the Secretary unauthorized power. *See Touche Ross & Co. v. Redington*, 442 U.S. 560, 577 n.18 (1979) ("[Plaintiffs] also appear to suggest that the rules adopted under § 17(a) [of the Securities Exchange Act of 1934] can themselves provide the source of an implied damages remedy even if § 17(a) itself cannot. . . . It suffices to say, however, that the language of the statute and not the rules must control."); *see also Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 213-14 (1976) ("rulemaking power granted to an administrative agency charged with the administration of a federal statute" is the power "to carry into effect the will of Congress as expressed by the statute," "not the power to make law") (citations omitted). The majority below, recognizing that the statute itself does not provide an enforceable right or privilege, relied heavily upon the regulations to justify allowing Plaintiffs to sue under § 1983. Rather than strengthening the majority's holding,

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[8] In contrast, Congress intended that the States fully comply with the Medicaid provision at issue in *Wilder*, 496 U.S. 498, which required the State to reimburse medical facilities for providing health care services. Thus, *Wilder* is distinguishable from this case.

however, this approach reveals the weakness of its statutory argument. Indeed, the Ninth Circuit's reliance on the regulations alone to create enforceable rights squarely raises the issue that Justice O'Connor found particularly troubling:

> In the absence of any indication in the language, legislative history, or administrative interpretation of the Brooke Amendment that Congress intended to create an enforceable right to utilities, it is necessary to ask whether administrative regulations *alone* could create such a right. . . . I am concerned . . . that lurking behind the Court's analysis may be the view that, once it has been found that a statute creates some enforceable right, *any* regulation adopted within the purview of the statute creates rights enforceable in federal courts, regardless of whether Congress or the promulgating agency ever contemplated such a result. Thus, HUD's frequently changing views on how best to administer the provision of utilities to public housing tenants becomes the focal point for the creation and extinguishment of federal "rights." Such a result, where determination of § 1983 "rights" has been unleashed from any connection to congressional intent, is troubling indeed.

Wright v. Roanoke Redev. & Housing Auth., 479 U.S. at 437-38 (1987) (O'Connor, J., dissenting) (emphasis in original).

Third, Congress has no authority to confer standing upon an individual who has suffered no injury in fact from government action and who will obtain no benefit from the judicial relief sought. *See Lujan v. Defenders of*

Wildlife, 504 U.S. 555 (1992). Thus, in evaluating whether a particular statutory scheme creates "enforceable rights," the Court must carefully examine the particular provisions involved to ensure that Congress intended to create a right or privilege that warrants private enforcement.

Here, Arizona did not cause Plaintiffs' real injury: the failure of the noncustodial parents to acknowledge paternity of or pay child support for their children. *See Linda R. S. v. Richard D.*, 410 U.S. 614, 618 (1973) (affirming dismissal for want of standing: "To be sure, appellant no doubt suffered an injury stemming from the failure of her child's father to contribute support payments," but state officials did not cause that injury by failing to enforce child support collection laws); *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976) (federal courts can "act only to redress injury that fairly can be traced to the challenged action of the defendant, and not injury that results from the independent action of some third party"). Moreover, Plaintiffs cannot establish that it is " 'likely,' as opposed to merely 'speculative,' that the[ir] injury will be 'redressed by a favorable decision,' " *Lujan*, 504 U.S. at 561 (citing *Simon*, 426 U.S. at 38), because even if Arizona maintained substantial compliance with Title IV-D – the goal that Plaintiffs purportedly seek – a court could only speculate as to whether any particular Plaintiff would then be better off than he or she is now. Judge Kleinfeld noted as much in his dissent in this case:

> [I]f the nominal clients asked their lawyers what was in it for them if they won, their lawyers would have to tell them that win or lose, they could not be assured of any money.

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> Even if the plaintiffs won, and even if the district judge or special master turned out to be a far better administrator of the child support enforcement division than the state . . . , no particular custodial parent could be assured of a dollar more than he or she gets now. A substantially complying child support enforcement unit would still fail to collect from a noncustodial parent who could not be located, or who was dead, unable to pay, or successful in avoiding collection attempts. Most of us who, as attorneys, have attempted collection work for clients have sometimes failed, and few of us have collected 100% of the money due 100% of the time.

App. 43a-44a (Kleinfeld, J., dissenting). Under these circumstances, it is questionable whether Plaintiffs even have Article III standing. At a minimum, the substantial compliance standard and the nature of the services provided under the IV-D program indicate that Congress did not intend to create rights enforceable under § 1983. *See Wilder*, 496 U.S. at 509 (a statute does not create an enforceable right under § 1983 where "the interest the plaintiff asserts is too vague and amorphous such that it is beyond the competence of the judiciary to enforce") (citations omitted).

Plaintiffs' claims based upon Title IV-D simply cannot support a cause of action under § 1983. In light of the hopeless conflict among the circuits on this issue and the Ninth Circuit opinion's many conflicts with this Court's precedents, the Court should grant certiorari to review the contrary holding below.

3. The Court of Appeals Opinion, Authorizing Over Three Million Custodial Parents to Sue State Officials in Federal Court to Enforce Obligations Under State Child Support Programs That Are Already Subject to Federal Executive Oversight, Will Not Help the Custodial Parents and Will Impair the Programs' Overall Effectiveness – A Result Never Intended by Congress in Enacting Either Title IV-D or the Civil Rights Act.

For reasons outlined above, the issue of whether § 1983 provides a private enforcement mechanism for Title IV-D would be significant enough if the effect of the decision below were restricted to Arizona. What makes the decision staggering is that it opens a floodgate of litigation against state or local officials in nine States. Every dissatisfied custodial parent, the total number of whom could exceed three million,[9] will have the right to file suit claiming that state officials are not doing enough to obtain payments from a noncustodial parent. To be

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[9] The 3,318,107 Title IV-D open case files in Ninth Circuit jurisdictions in 1994 (the most recent data available) were distributed as follows: California (2,135,813); Washington (337,639); Arizona (307,060); Oregon (240,968); Nevada (77,992); Hawaii (65,007); Idaho (54,613); Alaska (50,566); Montana (41,514); Guam (6,935). U.S. Department of Health and Human Services, Child Support Enforcement Nineteenth Annual Report to Congress, 41-49 (1995). In some States, the Title IV-D programs are run by local governments. For example, in California the counties operate the program. In 1994, Los Angeles County alone had over 600,000 cases. California Department of Social Services Information Services Bureau, California Child Support Management Information System Quarterly Report for October-December 1994, Table 1 (1995).

sure, the problem of "dead-beat" parents is a significant one. But it is extremely unlikely that the child support enforcement program in Arizona or any other State will be measurably improved by exponentially increasing the amount of litigation with which the program must contend. The resources drained by and the attention diverted to such litigation can only reduce the effectiveness of the States' methods of enforcing child support obligations.

Indeed, granting the remedy here is likely to injure Plaintiffs. By creating a private right of action to enforce Title IV-D, the court of appeals invests the judiciary with the power to duplicate the enforcement and oversight authority that Congress granted to the Secretary. If Plaintiffs prevail, the federal court probably will appoint a Special Master to monitor the Title IV-D program. This will mean that the State Director, without being able to unilaterally expand the limited resources available, will be required to respond to the Special Master's demands while simultaneously trying to keep the program in substantial compliance with the Secretary's mandates. Every dollar and every minute spent responding to a Special Master's demands is a dollar and a minute not spent delivering services to Plaintiffs. Overlapping judicial oversight will not only further divert limited resources, but may also result in imposing inconsistent obligations upon the State. At best, the requested relief would be a "hurry up" order from the federal court directing the State to "address all the shortcomings the Secretary has already ordered corrected." *Carelli*, 923 F.2d at 1215-16. At worst, it would subject the State Director to contempt liability for trying to satisfy the Secretary's demands

rather than those of the federal court.[10] Thus, the practical effect of the court of appeals opinion is contrary to Title IV-D's purpose, which is to encourage the States to create and operate an efficient and effective child support program.

By creating a private right of action to sue under Title IV-D, the court of appeals opinion transfers power over the Title IV-D program from state and federal executive officials to federal judges. Congress developed an elaborate program of agreements between the Secretary and the States, filled with opportunities for input from program officials and recipients to "calibrate the intensity of the enforcement efforts" through the political process, but the majority opinion essentially guts the program Congress envisioned by displacing it with judicial oversight:

> The district judge, unlike the state legislature, will not be balancing the child support enforcement unit's requests for money against the requests for money of all the other state agencies. Nor will the judge consider taxpayers'

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[10] With two branches of the federal government simultaneously and independently responsible for ensuring that the States comply with federal requirements, the potential for inconsistent rulings by the regulators and the courts is substantial. At a minimum, this dual enforcement scheme will eliminate the ability of the States to know with any confidence what the law actually requires of them. Absent some clear evidence, which does not exist, that this is what Congress intended, the Court should reject this manifestly cumbersome method of implementing Title IV-D.

> preferences for keeping more of their money. The judge's audience will be the legal services lawyers, the assistant state attorneys general, and the judges on our court. That is a different audience, presenting different pressures and incentives, from the elected officials of the state, the federal officials, and the state electorate.

App. 38a (Kleinfeld, J., dissenting). In short, the court of appeals opinion thrusts the judiciary into the day-to-day minutia of administering an elaborate program that Congress already assigned to the Executive Branch to regulate, apparently because the Ninth Circuit panel believes that judges can do a "better job." Yet "Congress established a political process, not a judicial one, to manage this administrative task." *Id.* at 46a. The usurpation authorized by the Ninth Circuit's decision upsets the delicate balance of federalism and separation of powers and denies federal executive branch and state officials the opportunity to take into account other governmental priorities. *See Allen v. Wright*, 468 U.S. 737, 759-60 (1984) (rejecting notion that courts should host suits by individuals challenging government agency program, because this would result in federal judges becoming " 'virtually continuing monitors of the wisdom and soundness of Executive action' ") (quoting *Laird v. Tatum*, 408 U.S. 1, 15 (1972)).

Courts must give state officials performing their official duties the "widest latitude" possible. *Rizzo v. Goode*, 423 U.S. 362, 378 (1976). The structural injunction and Special Master that Plaintiffs seek to have the court impose in this case would intrude on state sovereignty and would not advance the objective of rectifying any violation of the United States Constitution or laws. *See*

Freeman v. Pitts, 503 U.S. 467, 489-91 (1992). Adherence to the principles of federalism and separation of powers should prevent the judiciary from invading the territory designed and reserved for the other branches and levels of government.

* * *

This case provides the Court with an opportunity to give the lower courts much needed guidance concerning the proper role of § 1983 in promoting nonconstitutional interests. The decision below allows a radical use of § 1983 to usurp state and federal executive branch responsibility for enforcing Title IV-D, a result which Congress could not have intended in enacting Title IV-D. Accordingly, the time has come for this Court to decide whether § 1983 really is just "a platform on which . . . lawyers can stand to have their voices heard in the administrative decisionmaking for the agency, and to collect attorneys' fees," App. 44a (Kleinfeld, J., dissenting), or whether § 1983 instead has the more limited, but fundamental purpose of protecting only those rights that are "unambigously enforceable." Because the decision below squarely poses this issue, the Court should review this case on the merits.

CONCLUSION

This Court should grant the Petition for Writ of Certiorari.

Respectfully submitted,

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March 7, 1996

APPENDIX A

Cathy FREESTONE, individually, on behalf of their minor children and on behalf of all others similarly situated; Susan Harrington, individually, on behalf of their minor children and on behalf of all others similarly situated; Sonya Madrid, individually, on behalf of their minor children and on behalf of all others similarly situated; Judith Rogers, individually, on behalf of their minor children and on behalf of others similarly situated; Esperanza Laustaunau, individually, on behalf of their minor children and on behalf of others similarly situated, Plaintiffs-Appellants,

v.

Charles E. COWAN, Director, Arizona Department of Economic Security, in his official capacity, Defendant-Appellee.

No. 93-16697.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Feb. 17, 1995.

Decided Oct. 12, 1995.

William E. Morris, Southern Arizona Legal Aid, Inc., Tucson, Arizona, for the plaintiffs-appellants.

Steven J. Silver, Sherry M. Klein, Mirian M. Yim, Assistant Attorneys General, Phoenix, Arizona, for the defendant-appellee.

Appeal from the United States District Court for the District of Arizona.

Before: STEPHEN REINHARDT, THOMPSON and ANDREW J. KLEINFELD, Circuit Judges.

REINHARDT, Circuit Judge:

This case involves a class action brought by custodial parents, primarily mothers, and their children who have been unable to obtain federally required child support enforcement services from the state of Arizona. The class members sued under § 1983 in an attempt to force the state to comply with its federal obligations, under Title IV-D of the Social Security Act, to identify and seek support from "deadbeat dads." The federal courts have splintered on the question of whether a § 1983 action is available to enforce Title IV-D. The district court adopted the reasoning and approach of the Sixth Circuit finding such relief unavailable and granted summary judgment against the plaintiff families. We join the First and Eighth Circuits in holding that § 1983 is available and reverse.

BACKGROUND

As a condition of participating in the federal Aid to Families with Dependent Children (AFDC) program, states are required to adopt a plan for child support enforcement pursuant to Title IV-D of the Social Security Act, and to operate a program in substantial compliance with that plan. 42 U.S.C. § 602(a)(27). The state program must provide a variety of services including establishment of paternity, enforcement of support orders, and parent locator services. The state must provide these enforcement services both to families receiving AFDC and to non-AFDC families that request them. AFDC families must assign their rights to monetary child support to

the state; however, the first fifty dollars of any support collected each month is "passed through" to the AFDC family. All money collected on behalf of non-AFDC families is passed on entirely to the family. A large portion of the costs associated with administering a state's Title IV-D program is reimbursed by the federal government.[1]

The Secretary of Health and Human Services is responsible for monitoring state compliance with Title IV-D through periodic audits, and may impose penalties in the form of a reduction in AFDC money for noncompliance, ranging from one to five percent. From 1985 until 1991, Arizona failed three audits conducted by the Department of Health and Human Services (HHS). After the first failed audit, Arizona devised a Corrective Action Plan (CAP) which was approved by the Secretary.[2] However, subsequent audits showed that this CAP was not successfully implemented. After the final failed audit,

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[1] The reimbursement rate ranges from 66-90%. General operating expenses are reimbursed on the following scale: 70% for fiscal years 1984-87, 68% for fiscal years 1988-89, and 66% for fiscal year 1990 and each following fiscal year. See 42 U.S.C. § 655(a)(2). Prior to fiscal year 1984, states were reimbursed at a rate of 75%. State expenditures related to an automatic data processing and information retrieval system or related to laboratory costs incurred in establishing paternity are reimbursed at a rate of 90%. See 42 U.S.C. § 655(a)(1). The Secretary has promulgated regulations for determining exactly which state expenditures are reimbursable. See 45 C.F.R. § 304.20.

[2] A corrective action plan sets forth the steps necessary to achieve substantial compliance with the Title IV-D requirements. See 45 C.F.R. § 305.99. Even though the Secretary approves a CAP, this is no guarantee that the state will be found in substantial compliance in subsequent audits.

Arizona devised a new CAP. The Secretary approved the 1992 CAP and waived the 1% penalty. At the time the complaint was filed, the CAP was scheduled to expire on March 1, 1993. During this most recent CAP period, Arizona's State Auditor General conducted an internal performance audit of the child support enforcement program and declared it "barely functioning."[3]

Appellants are a class of Arizona custodial parents of minor children who qualify for enforcement services under Title IV-D. The class includes both AFDC and non-AFDC families. The five named plaintiffs in this action are Cathy Freestone, Susan Harrington, Sonya Madrid, Judith Rogers and Esperanza Laustaunau. The custodial parents assert that Arizona's child support enforcement administration systematically fails to furnish them with the services mandated by federal law. The original complaint and the appellant's brief recites a litany of abuses to which the named plaintiffs have been subject. The stories told by the five named plaintiffs document a range of administrative abuses extending from simple incompetence and bureaucratic bungling to shockingly callous

[3] The internal audit documented a host of problems in the Arizona program. Among other deficiencies, the auditor noted that regular support payments were received in only 3% of the approximately 275,000 cases assigned to DCSE, and only 25% of these cases even have a valid support order established. Because of the widespread system problems, as of 1992, Arizona's Title IV-D program had failed to collect hundreds of millions of dollars in delinquent child support payments.

indifference.[4] The most fortunate of the named plaintiffs appears to be Cathy Freestone.

After their divorce, Cathy Freestone's former husband failed to meet his monthly child support obligations. Freestone could not afford private counsel so she turned to Arizona's Department of Child Support Enforcement (DCSE) for collection assistance. Freestone completed the necessary forms to obtain a wage assignment from her ex-husband's employer. A month later, she called DCSE and was told that the case agent was still waiting for information from a section of the Phoenix office. It was only after Freestone volunteered to procure the information herself and submitted it to her case agent that any progress began to take place. Eventually the wage assignment order was filed, but Freestone discovered that during the interim her ex-husband had switched to a higher paying job for a different employer. She then urged DCSE to obtain a valid wage assignment against the new employer and to obtain a modification of the divorce decree for increased child support payments. Once again, DCSE failed to act in a timely manner. Freestone's ex-husband again switched jobs, this time moving to a lower-paying job in an attempt to avoid increased child support obligations. Although DCSE eventually obtained a wage assignment order against his most recent employer, payments have remained sporadic and DCSE has failed to provide periodic notice to Freestone or to explain the continuing irregularities.

[4] These stories are outlined in detail in the plaintiffs' original complaint. Because of the posture of this case, we accept all of the alleged facts as true.

Compared to the other named plaintiffs, Freestone's frustrating experiences appear to have been relatively mild. Susan Harrington has obtained, at most, meager assistance from DCSE. Harrington has cooperated with DCSE and its predecessor since 1980 in an effort to force her ex-husband to comply with his support obligations for their three minor children. DCSE has repeatedly lost Harrington's case file and only attempts to contact Harrington's ex-husband when she personally tracks him down and provides the agency with his current address and employment information. Often times, when Harrington has managed to find her ex-husband (who at all times resided and worked in Arizona) and inform DCSE of his whereabouts, because of its extraordinarily long delays in taking enforcement action, he successfully relocates and escapes the agency's grasp. In 13 years, DCSE has managed to obtain only two monthly support payments for Harrington.

At the farthest end of the spectrum, are the plaintiffs who simply have received no help at all. For example, Sonya Madrid is an AFDC mother of four who has consistently provided DCSE with all the required information and has repeatedly given the agency her nomadic ex-husband's address. Although Madrid believes that over the past 10 years DCSE has obtained some support payments from her ex-husband, she has *never* received a pass-through payment.

Similarly, Judith Rogers unsuccessfully sought paternity establishment assistance from DCSE. Although her child's father has acknowledged paternity and his name appears on her son's birth certificate, Rogers needs a formal declaration of paternity in order to establish a

valid child support order. Also, if paternity were legally established, her son would be entitled to payments against his father's social security account. Rogers first applied for DCSE services in 1980. Although the father's whereabouts are known, the agency has failed to establish paternity over a thirteen-year period. Rather, it has managed to lose Rogers' file on multiple occasions, forcing her to reapply for services each time. At the time this action was filed, Rogers' son was a few months away from reaching majority.

Because of systematic failures including the failure to procure wage assignment when all information as to the former spouse's current employer and address has been provided by the custodial parent, the failure to disburse collected support payments in a timely manner or to sufficiently account for payments collected, the frequent losses of clients' files thus forcing them repeatedly to reinitiate enforcement procedures and to complete voluminous forms and burdensome paperwork over and over again, and the inexplicable failure to account for or disburse "pass-through" payments, the parents filed this § 1983 action. They seek equitable relief including a declaratory judgment that the current operation of the Arizona Title IV-D program violates federal law, and a permanent injunction enjoining the state from engaging in this pattern and practice of noncompliance and requiring affirmative measures to achieve and maintain substantial compliance with federal law.

Defendant Cowan, Director of Arizona Department of Economic Security, filed a motion to dismiss premised on two grounds: 1) a Rule 12(b)(1) dismissal for lack of standing and thus a lack of subject matter jurisdiction; 2)

a Rule 12(b)(6) dismissal for failure to state a claim on which relief can be granted. The state attached various exhibits to its motion, including its most recent CAP. Because of the attachments and exhibits, the district court treated the motion as one for summary judgment. The Director raised numerous arguments in support of his motion, only three of which the district court analyzed and ruled on: He argued that the recipients of Title IV-D services are not the intended beneficiaries of the Act; that there are no mandatory requirements upon the state giving rise to enforceable rights under § 1983; and that under the Sixth Circuit *Carelli* rationale, the Title IV-D auditing scheme precludes an action under § 1983.

Rejecting the first two arguments, the district court found, first, that persons in plaintiffs' position are the intended beneficiaries under Title IV-D; and, second, that although there is no clear requirement that every applicant receive prompt Title IV-D services, plaintiffs are entitled to bring the action if the remedy they request increases their chances of receiving the services.

Although the district court found that the plaintiffs had rights under Title IV-D that were enforceable in a § 1983 action, it nonetheless granted summary judgment for the defendant. It relied on the Sixth Circuit's *Carelli* decision which held that Congress had foreclosed relief under § 1983 by adopting a federal auditing system for the child support enforcement program.[5] The court also agreed with *Carelli* that its ruling was similar to an abstention order. We review de novo and reverse.

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[5] *See Carelli v. Howser*, 923 F.2d 1208 (6th Cir.1991).

ANALYSIS

The parties dispute the proper characterization of the district court's order. The plaintiffs primarily argue that the district court issued an unauthorized abstention order. They argue that the district court's act of "quasi-abstention" runs contrary to Ninth Circuit and Supreme Court authority.[6] Plaintiffs base their characterization of the order on an analogy invoked by *Carelli* and reiterated by the district court. Although the district court analogized its disposition of the case to an abstention order, it is clear that the basis of its holding was its conclusion that Title IV-D contained a "comprehensive remedial scheme." We read the district court's order as ultimately turning on the question whether a § 1983 action is available to enforce Title IV-D. We now address that question.

I. Availability of a § 1983 Action

It is well settled that § 1983 provides a private cause of action for violations of federal statutes. *Maine v. Thiboutot*, 448 U.S. 1, 100 S.Ct. 2502, 65 L.Ed.2d 555 (1980). There are two exceptions to this rule. First, a § 1983 action is unavailable if the statute does not create enforceable rights. In other words, the statutory provision at issue must be intended to benefit the plaintiff. *Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498, 509, 110 S.Ct. 2510, 2517, 110 L.Ed.2d 455 (1990). Second, a § 1983 action is unavailable

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[6] Plaintiffs also argue that HHS oversight does not evidence congressional intent to foreclose a § 1983 action; that the district court's failure to grant *any* relief violates ordinary principles of equity jurisdiction; and that *Carelli* is factually inapposite to their case.

if Congress has foreclosed enforcement of the statute in the enactment itself. *Id.* at 509, 110 S.Ct. at 2517. Generally, this means either that the Act expressly precludes a § 1983 remedy in its provisions, or that the statute creates a remedial scheme that is sufficiently comprehensive to demonstrate congressional intent to preclude a § 1983 remedy. *Id.* at 520, 110 S.Ct. at 2523.

Currently, there is a three-way split of authority as to the availability of a § 1983 action to enforce Title IV-D. This circuit has not previously addressed the question.[7] A few courts have concluded that Title IV-D creates no enforceable rights. *See Wehunt v. Ledbetter,* 875 F.2d 1558 (11th Cir.1989); *Mason v. Bradley,* 789 F.Supp. 273 (N.D.Ill.1992); *Oliphant v. Bradley,* 1992 WL 153637 (N.D.Ill. Feb. 20, 1992) (not reported in F.Supp.). An impressive majority of courts has found that it does. *See Carelli v. Howser,* 923 F.2d 1208 (6th Cir.1991); *Howe v. Ellenbecker,* 8 F.3d 1258 (8th Cir.1993); *Albiston v. Maine Commissioner of Human Services,* 7 F.3d 258 (1st Cir.1993);

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[7] There have been two Ninth Circuit cases involving private suits and Title IV-D. *Barnes v. Healy,* 980 F.2d 572 (9th Cir.1992) involved custodial parents challenging California's child support enforcement program. However, that class action involved procedural due process claims, and the issue of enforceable statutory rights was not addressed.

Vanscoter v. Thompson, 920 F.2d 1441 (9th Cir.1990) involved a class action brought by AFDC recipients challenging federal regulations and state practice relating to notice and disbursement of "pass-through" payments. The court never stated whether the suit was brought under the APA, § 1983, or directly under Title IV-D. At least one of the plaintiffs' claims was based on due process grounds. *Id.* at 1450. In any case, the issues discussed here were neither raised nor addressed.

Monzon v. Martinez, 833 F.Supp. 479 (E.D.Pa.1993); *King v. Bradley,* 829 F.Supp. 989 (N.D.Ill.1993); *Behunin v. Jefferson County Dep't of Social Services,* 744 F.Supp. 255 (D.Colo.1990). Of the courts that have found enforceable rights under Title IV-D, apparently only one (other than the district court below) has held that a comprehensive enforcement scheme nonetheless precludes a § 1983 action. *See Carelli,* 923 F.2d 1208. The remaining courts have found that neither of the two general exceptions to § 1983 availability is applicable to Title IV-D. *See Howe v. Ellenbecker,* 8 F.3d 1258 (8th Cir.1993); *Albiston v. Maine Commissioner of Human Services,* 7 F.3d 258 (1st Cir.1993); *King v. Bradley,* 829 F.Supp. 989; *Behunin v. Jefferson,* 744 F.Supp. 255. We conclude that this latter group of cases represents the better view, and hold that § 1983 is available for enforcement of Title IV-D.

A. Enforceable Rights

1.

In *Wilder v. Virginia Hosp. Ass'n,* 496 U.S. 498, 110 S.Ct. 2510, 110 L.Ed.2d 455 (1990), the Court set forth a three-factor test for analyzing whether a particular statute establishes "enforceable rights" which can be vindicated in a private action under § 1983. The question presented in *Wilder* was whether the Boren Amendment to the Medicaid Act requiring states to reimburse health care providers according to "reasonable and adequate" rates created enforceable rights under § 1983.

The Court explained that the "enforceable right" inquiry turns on whether the plaintiff is one of the intended beneficiaries of the statute, whether the statute

imposes a binding obligation on the state, and whether the plaintiffs' asserted interest is so "vague and amorphous" as to be "beyond the competence of the judiciary to enforce." *Id.* at 509, 110 S.Ct. at 2517 (internal citations and quotations omitted).[8] The Court applied this analysis to determine that the Boren Amendment created enforceable rights in health care providers. *See also Howard v. City of Burlingame*, 937 F.2d 1376, 1378 (9th Cir.1991).

Subsequent to the Court's decision in *Wilder*, the Court revisited the topic of the meaning of "enforceable rights" in *Suter v. Artist M.*, 503 U.S. 347, 112 S.Ct. 1360, 118 L.Ed.2d 1 (1992). The Court's discussion in *Suter* is somewhat less hospitable to the concept of enforceable rights than prior cases, and some question exists as to whether the analysis in *Suter* alters the test set forth in *Wilder*. *See Suter*, 503 U.S. at 365, 112 S.Ct. at 1371 (Blackmun, J., dissenting). *See also Albiston*, 7 F.3d at 262 (noting argument that *Suter* appears to depart from *Wilder*); *King*, 829 F.Supp. at 992 n. 1 (*Suter* "casts some doubt on whether the *Wilder* framework was still valid") (collecting cases).

Suter v. Artist M., 503 U.S. 347, 112 S.Ct. 1360, 118 L.Ed.2d 1 (1992), involves a § 1983 class action brought on

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[8] The Court was careful to note that an analysis of whether a statute is enforceable under § 1983 and whether it is enforceable through an *implied* right of action are two separate and distinct inquiries. 496 U.S. at 508 n. 9, 110 S.Ct. at 2517 n. 9. The inquiry into whether an *implied* right of action exists is governed by the four-factor *Cort v. Ash test*. As the Court's discussion shows, it is generally more difficult to establish an implied right of action than it is to establish the availability of a § 1983 action.

behalf of child beneficiaries of the Adoption Assistance and Child Welfare Act of 1980. The Act requires states to adopt plans regarding foster care and adoption services that, *inter alia*, ensure that "reasonable efforts will be made" to prevent removal of children from their homes and to facilitate the re-unification of families. 503 U.S. at 351-52, 112 S.Ct. at 1364. One of the central issues in *Suter* was whether the "reasonable efforts" clause of the Adoption Act can be enforced in a § 1983 action.

The Court concluded that the "reasonable efforts" clause does not confer enforceable rights upon the Act's beneficiaries. The Court reasoned that when "reasonable efforts" is read in context, the clause does not itself create binding obligations on the state because no further statutory guidance can be found as to measuring what constitutes "reasonable efforts." *Id.* at 359, 112 S.Ct. at 1368. The Court also noted that the regulations promulgated under the Act are not specific and do not provide notice to states that a failure to do anything other than submit a plan with stipulated features for Secretary approval is a condition to receive funding. *Id.* at 361, 112 S.Ct. at 1369. Thus, the Court concluded that "reasonable efforts" simply imposes a "generalized duty on the State, to be enforced not by private individuals, but by the Secretary. . . . " *Id.* at 363, 112 S.Ct. at 1370.

The Court did not explain the impact of its *Suter* analysis on the *Wilder* test. Subsequent courts have taken a variety of approaches towards reconciling *Suter* and *Wilder*. *Compare Albiston*, 7 F.3d at 262-64 (making *Suter* a threshold inquiry) *with Howe*, 8 F.3d at 1262-63 (synthesizing two cases into a semi-coherent whole). We conclude that *Suter* represents an elaboration and amplification of

the *Wilder* test rather than an unannounced and unacknowledged departure. It is notable that the *Suter* majority both cited and relied on *Wilder*. While the *Suter* dissent proclaimed the majority's opinion a departure from and a failure to apply precedent, the majority neither acknowledged nor addressed the dissent's argument. We can not conclude that the Court would overrule *sub silentio* a precedent of such recent vintage. *Wilder* and *Suter* are separated by a mere two years. Because the *Suter* majority's silence in the face of the dissent's accusation strongly suggests that the majority believed that it was not overriding precedent but instead was merely applying settled legal principles, we must conclude that that is exactly what it did. Accordingly, we read *Suter* as the Court's effort to provide additional guidance on what is a "binding obligation" and when an asserted interest may be deemed "judicially enforceable."

2.

As almost every court to consider the issue has concluded, we hold that Title IV-D clearly meets the three *Wilder* requirements as amplified in *Suter*. First, the statutory and regulatory scheme creates binding obligations upon the state. In order to receive AFDC funding, a state must operate a Title IV-D program. Specifically, the state must have an approved plan for child and spousal support and must operate a child support program "in substantial compliance with such plan." 42 U.S.C. § 602(a)(27). At first blush, one might assume that the phrase "substantial compliance" is no more concrete and unambiguous than the "reasonable efforts" phrase found problematic in *Suter*. However, unlike "reasonable

efforts" in the program at issue in *Suter*, "substantial compliance" does not stand alone. The statute and regulations under Title IV-D provide highly detailed requirements imposing specific duties on the states.

The Title IV-D scheme stands in sharp contrast to that in *Suter*. In *Suter*, the Court determined that the only affirmative obligation placed on the states by the Act was a requirement that a state have a plan approved by the Secretary containing a list of certain features. 503 U.S. at 357, 112 S.Ct. at 1367. The Court then examined the regulations promulgated under the statute and determined that they imposed no additional obligations. Central to the Court's determination was the observation that the relevant regulations were "not specific, and do not provide notice to the states that failure to do anything other than submit a plan with the requisite features . . . is a further condition on the receipt of funds . . . " 503 U.S. at 361, 112 S.Ct. at 1369.

The same is not true with regard to Title IV-D. Both the statute and regulations establish clear requirements upon the state regarding the administration of a Title IV-D program. For example, 42 U.S.C. § 654 sets out at length the specific provisions which must be included in a state plan for child and spousal support. A small sampling of these mandatory provisions include: a requirement that the state will establish the paternity of children born out-of-wedlock to AFDC recipients [§ 654(4)(A)]; provide periodic notice to families of the amount of support collected on their behalf based on a specified schedule ranging from a monthly to a quarterly basis [§ 654(5)]; establish a service meeting designated requirements to locate absent parents [§ 654(8)]; provide that the state will

adhere to the administrative regulations established to ensure an effective program for locating absent parents, establishing paternity, obtaining support orders, and collecting support payments [§ 654(13)]; provide that the state establish procedures for procuring delinquent child support payments from tax refunds [§ 654(18)]; provide that the state regularly and frequently publicize the availability of child support enforcement services [§ 654(23)].

But more than identifying specific provisions to be included in a state plan for its child support enforcement program, the statute also sets forth explicit administrative procedures that a state must establish and implement to ensure the effectiveness of its program. See 42 U.S.C. § 666. A small sample of these include procedures for garnishment of wages, garnishment of state tax refunds, imposition of liens against real and personal property for delinquent support, and for establishing a series of presumptions and requirements related to genetic testing for paternity determinations.

Finally, the statute also sets forth detailed criteria for measuring compliance with the statute. For example, 42 U.S.C. § 652(g) establishes performance standards for state paternity establishment programs. The baseline performance standard established in 75%, and the statute sets out a formula for calculating this percentage based on the total number of out of wedlock births during a fiscal year.

Although the Title IV-D statute itself is highly detailed, the regulations promulgated under the statute provide even more specificity. In 45 C.F.R. § 303, the

Secretary has set forth very specific and detailed regulations regarding standards for individual states' Title IV-D program operation. For example, the regulations lay out a step-by-step process to be followed when attempting to locate absent parents and their income or assets. See 45 C.F.R. § 303.3. These steps include examining all appropriate location sources within 75 calendar days of determining location is needed,[9] referring appropriate cases to the Title IV-D agencies of other states, and repeating location attempts quarterly or immediately upon receipt of new information.

The regulations also set forth highly detailed and specific procedures (including time limits, methods, and resources to use) regarding the establishment of support obligations, establishment of paternity, enforcement of support obligations, provision of services in interstate IV-D cases, review and adjustment of child support orders, and case closure criteria. Reading both the statute and the regulations, states have a clear indication of the terms of the bargain they are entering into when they agree to accept AFDC funds.

In sum, it is not simply the use of the phrase "substantial compliance" that creates enforceable rights. Our conclusion that the right is enforceable results in large

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[9] Section 303.3(b)(1) identifies "appropriate location sources." These include the Federal Parent Locator Service, officials administering various public assistance and social welfare programs, relatives and friends of absent parent, the local telephone company, U.S. postal service, unions, fraternal organizations, police records, parole records, probation records, various state departments handling income taxation, driver's licenses, and vehicle registration.

measure from the fact that the state is required to provide specified services which meet a specified quantitative standard. The statute and the regulations set out in explicit detail the type of services to be rendered and the standards by which those services will be measured. "Substantial compliance" is simply a short hand way of setting forth a standard that the state must meet. The state can meet this standard only by satisfying the concrete requirements which are specified in the statutory and regulatory scheme.

Second, plaintiffs' asserted interest is not vague or amorphous, and it is sufficiently concrete to be judicially enforceable. The provision of specified services in compliance with a defined plan gives rise to a judicially enforceable interest. The statutes and regulations clearly set out what services are to be provided and by what standards a program is to be evaluated. The core services mandated by federal law are paternity location, paternity establishment, establishment of child support orders, and child support collection. Whether a state's program provides those services and whether plaintiffs are receiving to those services to the degree required by law is judicially ascertainable.

Finally, the statutory language and legislative history show that Title IV-D is intended to benefit needy families with children.[10] *See Howe*, 8 F.3d at 1262. As the *Howe*

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[10] Notably, the standard for intended beneficiary under § 1983 is somewhat broader than that under an implied right of action. For purposes of an implied right of action, the plaintiff must demonstrate that he is a member of a class for whose "*especial* benefit the statute was enacted." *Cort v. Ash*, 422 U.S. 66, 78, 95 S.Ct. 2080, 2088, 45 L.Ed.2d 26 (1975). This means that protection of the plaintiff's class must have been the *primary* concern of the legislation rather than a secondary or ancillary consideration. *Id.* at 80, 95 S.Ct. at 2089-90. In contrast, for purposes of § 1983, multiple statutory beneficiary classes may exist and plaintiff's group need only fit in one of those beneficiary classes. *Cf. Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 110 S.Ct. 444, 107 L.Ed.2d 420 (1989) (NLRA creates several classes of federal rights enforceable in § 1983 action). *See also Carelli*, 923 F.2d at 1211 (noting that a statute may have more than one class of beneficiaries and this does not preclude § 1983 enforcement).

There are more stringent requirements for implied rights of action because judicially constructed implied rights of action raise separation of powers concerns not implicated by § 1983. *See Wilder*, 496 U.S. at 508 n. 9, 110 S.Ct. at 2517 n. 9. Congress controls the availability of remedies for violations of statutes, and § 1983 provides an express congressional authorization of private actions. *Id.*

court noted, the first section of Title IV-D sets out several purposes for the enactment including: "enforcing the support obligations owed by absent parents . . . and assuring that assistance in obtaining support will be available under this part to all children (whether or not eligible for [AFDC]) for whom such assistance is requested. . . . " 42 U.S.C. § 651. The relevant congressional committee report states:

> The Committee believes that all children have the right to receive support from their fathers. The Committee bill . . . is designed to help children attain this right, including the right to have their fathers identified so that support can be obtained. The immediate result will be a lower welfare cost to the taxpayer but,

> more importantly, as an effective support collection system is established fathers will be deterred from deserting their families to welfare and children will be spared the effects of family breakup.

S.Rep. No. 93-1356 *reprinted in* 1974 U.S.C.C.A.N. 8133 at 8146. Although the same report makes note of the financial benefits that would accrue to the government if more absent parents supported their children, Congress realized that one of the more important interests vindicated by this Act was the rights of children:

> The Committee believes that an AFDC child has a right to have its paternity ascertained in a fair and efficient manner unless identification of the father is clearly against the best interests of the child. Although this may in some cases conflict with what a social worker considers the mothers' short-term interests, the Committee feels that the child's right to support, inheritance, and to know who his father is deserves the higher social priority.

Id. at 8154-55.

Thus, we agree with the overwhelming weight of authority recognizing that Title IV-D was intended to benefit needy families, and particularly children. *See Howe*, 8 F.3d at 1262 (collecting cases).

3.

Although we find it quite clear that Title IV-D creates enforceable rights in families in need of Title IV-D services, there is some question as to the contours of those

rights. The state argues that the most plaintiffs are entitled to is "substantial compliance." Under this reasoning, so long as the state meets the 75% requirement, no plaintiffs may sue, even if they fall within the 25% of cases not being serviced. *See King*, 829 F.Supp. at 994.

In contrast, the plaintiffs contend that the 75% simply establishes the minimum requirement for funding without penalty, but that in some areas, at least, 100% compliance is mandatory. They further argue that § 303 of the regulations sets forth the efforts that must be taken in each and every case. In support of their arguments, plaintiffs primarily rely on *Withrow v. Concannon*, 942 F.2d 1385 (9th Cir.1991).

In *Withrow*, a class comprised of applicants for and recipients of AFDC, Food stamps, and Medicaid sued Oregon officials seeking declaratory and injunctive relief compelling the defendants to hold hearings in compliance with federally prescribed time limits. The district court granted summary judgment in favor of the state officials on the ground that they had substantially complied with the applicable federal regulations. We reversed, reasoning that "substantial compliance" was simply a standard for termination of federal funding and was not an appropriate standard for defining the rights of the relevant beneficiaries. 942 F.2d at 1387. We explained that the funding standard was not a measure of what the regulations require but rather a measure of when a failure to meet those regulations had reached sufficient magnitude to trigger a funding cessation. *Id.* In order to determine precisely what the regulations required, we

reasoned, one must look to the language of the regulations themselves. We pointed to the unequivocal language of the regulations that imposed mandatory requirements and stated:

> From the standpoint of the applicants or recipients who are denied hearings and decisions within the time mandated by federal regulations, it is not comfort to be told that there is no federal remedy because the state is in "substantial compliance" with federal requirements.

Id. at 1387.

Plaintiffs argue that the § 303 regulations promulgated under Title IV-D are analogous to the regulations in *Withrow* and that *Withrow* is controlling. They point out that the regulatory language is equally mandatory and unequivocal in both cases. Defendants attempt to distinguish *Withrow* on the basis that *Withrow* involved basic subsistence rights not at issue here. We do not agree that *Withrow* can be so easily distinguished, but we need not decide that point here. The question whether federal law precludes an individual remedy during periods in which the state is in "substantial compliance," although an interesting one, is not before us. The district court made no factual findings as to the level of Arizona's compliance but rather disposed of this case on the legal ground that a § 1983 action is generally unavailable in Title IV-D cases. It is only the latter proposition that we consider here. Accordingly, the state's representations at oral argument regarding the improvements in certain core functions of its program are simply irrelevant to the issue before us.

B. Congressional Foreclosure of Enforcement

The district court based its conclusion that Title IV-D contains a remedial scheme sufficiently comprehensive as to foreclose a § 1983 remedy on the Sixth Circuit's decision in *Carelli*.[11] *Carelli*, like the present case, involved a class of custodial parents who sued the responsible state officials for injunctive relief in a § 1983 action challenging their administration of the state's child support enforcement services. On interlocutory appeal from the district court's denial of their motion to dismiss, the state officials made two arguments: first, that the plaintiffs were not the intended statutory beneficiaries; and second, that Congress had foreclosed private enforcement through the enactment of a comprehensive auditing scheme.

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[11] The district court's reading of *Carelli* is not the only possible one. A reasonable alternative reading of the case is that a § 1983 action is not precluded in *every* Title IV-D case, but rather that on the facts presented there, the action should not be allowed to proceed. A later Sixth Circuit decision has construed *Carelli* as barring the action because "the *Carelli* plaintiffs, in particular, failed to state a cognizable claim because they made 'no attack on the applicable regulations,' and alleged 'no acts of non-compliance beyond those already unearthed' by the Secretary." *Wood v. Tompkins*, 33 F.3d 600, 612 n. 23 (6th Cir.1994).

As the plaintiffs point out, such a basis for barring the claim comes dangerously close to an unauthorized and perhaps inappropriate species of abstention. However, we need not explore the full ramifications of such a construction of *Carelli* because it is clear that the district court *here* relied on a construction of *Carelli* that focused on the comprehensive enforcement scheme. See Order at 4,7. This was also the construction offered by the State at oral argument.

The *Carelli* court rejected the first argument because the legislative history showed that one of the classes of intended beneficiaries was needy families with children. 923 F.2d at 1211. However, it ruled for the defendants on the second argument holding that the statute contained a comprehensive remedial scheme foreclosing a § 1983 action. In reaching this conclusion, the court pointed to the audit provisions and detailed performance criteria, and the fact that the statute and regulations had been amended several times, thus demonstrating "fine tuning." Because the state had failed two audits, been subject to a penalty, and was implementing a new Corrective Action Plan, the court characterized plaintiffs' action as an attempt to seek a " 'hurry-up' order from the federal court." *Id.* at 1215. The court concluded that it was unconvinced that "congress intended the federal judiciary to occupy the same ground at the same time and in the same manner as the secretary. . . . " *Id.* at 1216. The court also noted that the plaintiffs could each seek individual relief through private suits to enforce support orders and establish paternity.

Unlike all the other courts that have considered the comprehensive enforcement scheme argument, the district court in the case now before us agreed with and adopted the *Carelli* court's rationale. However, an examination of the cases in which the Supreme Court has discussed the issue shows that the Title IV-D audit and penalty scheme fall far short of the "sufficiently comprehensive" requirement.

Middlesex County Sewerage Authority v. National Sea Clammers, Ass'n, 453 U.S. 1, 101 S.Ct. 2615, 69 L.Ed.2d 435 (1981), established the "sufficiently comprehensive"

exception to § 1983 actions. In *Sea Clammers*, the Court found that the Federal Water Pollution Control Act (FWPCA) contained such an exhaustively comprehensive enforcement scheme that congress necessarily must have intended to foreclose a § 1983 cause of action. 453 U.S. at 13-14, 101 S.Ct. at 2623. The scheme consisted of elaborate enforcement provisions including authorization for governmental bodies to seek civil and criminal penalties, the right of any interested person to seek judicial review of agency action, and two separate citizen suit provisions.

Since *Sea Clammers* was decided, few statutes have been found to contain such a preclusive enforcement scheme, and the exception is viewed as a narrow one. The Court has often warned that it "will not lightly conclude that congress intended to preclude reliance on § 1983 as a remedy for the deprivation of a federally secured right." *Wright*, 479 U.S. at 423-24, 107 S.Ct. at 770. In fact, in only two cases has the Supreme Court found such a comprehensive scheme to exist. The first was *Sea Clammers* itself, and the second was *Smith v. Robinson*, 468 U.S. 992, 104 S.Ct. 3457, 82 L.Ed.2d 746 (1984). A central feature of both of these statutory schemes was the inclusion of express *private* remedies allowing citizens to compel state action. Title IV-D contains nothing akin to a separate private remedy.

Most pertinent to the present case, a remedial scheme that closely tracks the Title IV-D scheme has previously been deemed insufficiently comprehensive to foreclose § 1983 action. In *Wright v. Roanoke Redevelopment and Housing Authority*, 479 U.S. 418, 107 S.Ct. 766, 93 L.Ed.2d 781 (1987), tenants living in low-income housing projects owned by the city housing authority brought a § 1983 suit

alleging that the authority overbilled them for their utilities in violation of the rent ceiling imposed by the Brooke Amendment to the Housing Act. The Court reversed the court of appeals decision that the administrative scheme providing for enforcement by HUD foreclosed private enforcement. The Court found that agency's power to audit, enforce contracts, and cut off federal funds constituted "generalized powers" insufficient to foreclose § 1983 remedies. 479 U.S. at 428-30, 107 S.Ct. at 773.

The sufficiency of audits and fiscal penalties as a remedial scheme could not have been more clearly rejected. Specifically, the Court stated: "Neither, in our view, are the remedial mechanisms provided sufficiently *comprehensive and effective* to raise a clear inference that congress intended to foreclose a § 1983 cause of action. . . . " 479 U.S. at 425, 107 S.Ct. at 771 (emphasis added). *See also Rosado v. Wyman*, 397 U.S. 397, 90 S.Ct. 1207, 1222, 25 L.Ed.2d 442 (1970) (rejecting argument that a federal court is without power to review state plan because the Department of Health, Education and Welfare (HEW) had power to cut off federal funds for noncompliance with statutory requirements; Court reasoned "We are most reluctant to assume Congress has closed the avenue of effective judicial review to those individuals most directly affected by the administration of its program").

The reasoning in *Carelli* is completely inconsistent with that in *Wright*, and *Carelli* did not attempt to distinguish the Supreme Court's discussion in that case. The Secretary here has no more power than HUD possessed in *Wright*. All HHS can do is audit and reduce AFDC funding. Moreover, the *Wright* Court explicitly rejected

the argument subsequently adopted by *Carelli* that plaintiffs have other state court remedies. The *Wright* Court reasoned that "the state-court remedy is hardly a reason to bar an action under § 1983, which was adopted to provide a federal remedy for the enforcement of federal rights." 479 U.S. at 429, 107 S.Ct. at 773.

In addition to this compelling and binding Supreme Court authority, an examination of Ninth Circuit cases where a remedial scheme was found to be sufficiently comprehensive shows that the Title IV-D scheme is meager by comparison.

In *Almond Hill School v. USDA*, 768 F.2d 1030 (9th Cir.1985), the plaintiffs sought an injunction to halt pesticide spraying in their area under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). Plaintiffs claimed that the pesticide project violated labeling provisions of FIFRA.

In finding that the enforcement scheme of FIFRA was sufficiently comprehensive, the court pointed to: the administrative and judicial enforcement procedures; administrative power to impose civil penalties against violators; criminal sanctions for intentional violations; express authorization to EPA Administrator and Attorney General to seek injunctive relief; an elaborate administrative review procedure and express provision for review of agency decision in district court or court of appeals; and procedures by which interested persons can file complaints with the Administrator to challenge particular use of pesticide. *See* 768 F.2d at 1035-38.

When compared to the factors identified in *Almond Hill*, the Title IV-D enforcement scheme is paltry indeed.

Although the statutes and regulations set forth highly detailed performance and audit criteria that states must comply with in order to "substantially comply" with federal law, the remedies for failure to "substantially comply" are neither similarly detailed nor specific. If a state fails to substantially comply, it is subject to increased monitoring. Rather than the statutorily prescribed three year audit, the state must be audited annually. If the state repeatedly fails the audits, the Secretary may reduce AFDC funding. This penalty ranges from one to five percent depending on the duration of noncompliance. There are no other provisions for administrative enforcement.

Moreover, there are no provisions for judicial enforcement. This complete lack of judicial enforcement strongly supports the conclusion that the Title IV-D enforcement scheme falls short of what is required to foreclose a § 1983 action. In *Keaukaha-Panaewa Community v. Hawaiian Homes*, 739 F.2d 1467 (9th Cir.1984), we noted that the Hawaiian Admissions Act provisions provided no private administrative or judicial remedies, but simply gave the federal government the right to sue. We concluded that this single *public* remedy could not foreclose a private § 1983 remedy. 739 F.2d at 1471. *See also Wright*, 479 U.S. at 426-27, 107 S.Ct. at 772 (noting that provisions for private judicial remedies evidence congressional intent to supplant a § 1983 remedy). If the presence of a public judicial remedy without a corresponding private remedy is insufficient to make an enforcement scheme "sufficiently comprehensive," then it would seem clear that a bar does not arise when the statute contains *no* judicial enforcement provision at all.

Under *Almond Hill*, it is also necessary to consider whether a § 1983 remedy would be inconsistent with the statutory remedies. Private enforcement here would not undermine existing statutory mechanisms because the HHS auditing scheme would not be interrupted. In fact, private enforcement may actually enhance effectiveness of the reduction penalty by giving states a greater incentive to comply with federal law. Unlike a small monetary penalty that decreases the amount of funds available for AFDC recipients, the contempt power of the court, as well as other traditional equitable remedies, is likely to be more successful in inducing compliance on the part of state officials, and where necessary, state legislators. Thus, the availability of private actions supplements the investigatory and enforcement power of HHS.

Our conclusion is the same as that reached by the First and Eighth Circuits. Both *Howe* and *Albiston* were decided after the district court issued its order here and both courts soundly rejected the rationale invoked in *Carelli*.

In *Howe v. Ellenbecker*, 8 F.3d 1258, 1263 (8th Cir.1993), the court reasoned that "Title IV-D does contain an enforcement scheme in the form of fiscal sanctions the federal government may assert against the state, but these remedial measures are neither comprehensive nor available to the class. The federal government's authority to audit and impose monetary sanctions does not constitute 'comprehensive' remedies." *Id*. The *Howe* court relied directly on *Wright* for its conclusion.

Albiston involved a class of AFDC recipients who brought a § 1983 action to compel the timely disbursement of pass-through and gap payments as required by Title IV-D and Title IV-A regulations.[12] The *Albiston* court expressly rejected the *Carelli* conclusion that the administrative enforcement scheme precludes § 1983 private actions. The court noted that "the Supreme Court repeatedly has held that administrative enforcement schemes must be presumed to *parallel* the private § 1983 enforcement remedy, rather than to 'occupy the same ground' as the state contends." 7 F.3d at 269 (original emphasis).

The *Albiston* court invoked a rationale similar to this court's earlier reasoning in *Withrow*. Indeed, the court specifically cited *Withrow* noting:

> In our view, the OCSE administrative enforcement scheme, authorizing penalties against participating states for "substantial noncompliance," seems intended to protect important *federal* interests, including prompt disbursement of federal funds to needy AFDC recipients as mandated by Congress, by ensuring that *overall* performance by the participating State does not fall below federally-prescribed levels. The private remedy afforded by § 1983, on the other hand, safeguards the *individual*

[12] Pass-through payments are regulated under Title IV-D. Gap payments are the difference between a family's predetermined level of need and the amount received from the state in AFDC. Under Title IV-A regulations, a state is required to fill this "gap" with money it collects through its Title IV-D program.

> *AFDC recipient's interests* in the timely receipt of the mandated federal benefits.

7 F.3d at 269 (original emphasis).

Again, the state argues that such a rationale is somehow distinguishable from the present case because *Albiston* involved important property interests not at stake here. We reject this distinction. First, it is factually incorrect. The plaintiff class here sets forth a plethora of alleged violations. The allegations include the failure to disburse pass-through payments and the mishandling of support payments collected on behalf of non-AFDC recipients. These allegations implicate concrete property rights.

Second, the other "non-property" interests implicated by the class allegations are no less important or deserving of legal protection. Congress has seen fit to deem these individual interests worthy of federal protection, and we are not in a position to second-guess this congressional judgment. Section 1983 protects *statutory* rights. Although some statutory rights may have a traditional property aspect, statutory rights without that aspect are certainly entitled to no less protection. Without attempting exhaustively to catalogue all of the non-property interests that Congress sought to vindicate through the statutory scheme, we simply note that it is peculiarly within Congress' prerogative to deem particular interests worthy of protection and whether or not an interest has a property aspect is irrelevant for determining whether Congress has created a comprehensive enforcement scheme to protect it.

For example, the allegations related to paternity establishment clearly implicate an interest Congress was determined to protect. Congress explained the importance of paternity establishment separate and apart from the opportunity to gain money and other financial support. As explained in the Committee report, a "child's right to support, inheritance, *and to know who his father is* deserves the higher social priority." S.Rep. No. 93-1356 *reprinted in* 1974 U.S.C.C.A.N. 8133 at 8155. For more than 13 years, plaintiff Rogers has sought assistance in establishing legal paternity for her son, to no avail. Her son has continuously been deprived of an interest Congress singled out for vindication. The fact that OCSE can audit Arizona's paternity services, identify the deficiencies, impose and subsequently waive a 1% penalty, and continue to periodically monitor the state's program, provides no redress for young Rogers' 13-year journey through familial limbo nor does it adequately prevent similar experiences from recurring. Moreover, the administrative process, according to plaintiffs, has had virtually no effect on improving Arizona's services.

Carelli catalogued the detailed provisions of the Title IV-D auditing scheme and equated them with a detailed remedial scheme. However, the purpose of auditing is to evaluate and reveal problems. Auditing leads to the development of corrective action plans. A corrective action plan identifies the steps the state should take in order to bring itself closer to substantial compliance. Auditing and corrective action plans are not themselves remedies.

The only administrative mechanism that truly falls into the "remedial" category is the penalty provision –

the scale by which states' federal funding is incrementally reduced for failure to substantially comply. At best, this can be characterized as a "public remedy." When closely scrutinized, one realizes that such a remedy fails to satisfy the same needs as a private remedy. As plaintiffs point out, a fiscal penalty on the state fails to vindicate the interests of the statutory beneficiaries; in fact, it serves to reduce funding that would otherwise be available to those members of the plaintiff class who are AFDC recipients. Moreover, the "penalties" here are not inherently remedial in nature. A state may "rationally" decide that it is less expensive to lose the 1 to 5% AFDC funds than to make the necessary expenditures to meet the federal requirements. In any event, the state's legal options in this case are limited to two: 1) it may accept federal funds and comply with the conditions attached to them; or 2) it may opt against participating in the program at all. Arizona has elected to participate in the AFDC program, and accordingly, it must fulfill its part of the contract. It cannot simply extract benefits while reneging on its concomitant obligations. See Rosado, 397 U.S. at 425, 90 S.Ct. at 1225 (Douglas, J., concurring) ("As long as a State is receiving federal funds [ ] it is under a legal requirement to comply with the federal conditions placed on the receipt of those funds.").

The *Carelli* court justified its holding by relying on Supreme Court dissents in *Monroe v. Pape*, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961) and *Maine v. Thiboutot*, 448 U.S. 1, 100 S.Ct. 2502, 65 L.Ed.2d 555 (1980). On the basis of these dissents, the court reasoned that utilizing § 1983 to enforce statutory rights against states undermines federalism principles and intrudes on state sovereignty.

Although the *Carelli* court's philosophical concerns may be shared by some commentators, the continued vitality of the *majority* opinions in *Thiboutot* and *Pape* has not been called into question.[13] The availability of a § 1983 action to enforce statutory rights is well settled. Given our responsibility to enforce congressional legislation and to respect binding Supreme Court authority, there can be no legitimate question as to the conclusion we must reach in this case.

II. Equitable Power of the Court

Both in their briefs and at oral argument, the defendants offered an alternative basis for affirming the district court. They argued that the district court's order can be characterized as a determination that equitable relief was unwarranted on the facts of this case. Rather than ruling that a § 1983 action is unavailable for Title IV-D violations, the state contends that the district court simply exercised its broad discretion to conclude that the

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[13] A similar argument was rejected in *Rosado*. Although the Court viewed "with concern" the "escalating involvement of federal courts in [the] highly complicated area of welfare benefits," the Court found that this was not sound reason for concluding that judicial relief in these areas was unavailable. 397 U.S. at 423, 90 S.Ct. at 1223. As the Court explained:

> "It is . . . peculiarly part of the duty of this tribunal, no less in the welfare field than in other areas of the law, to resolve disputes as to whether federal funds allocated to the States are being expended in consonance with the conditions that Congress has attached to their use."

Id. at 423, 90 S.Ct. at 1223.

facts of this case do not warrant issuance of an injunction at this time. Under the state's view, the factors counseling against an injunction are the federal agency oversight process, the state's commitment to improve Title IV-D services as evidenced by its recent correct action plan, and HHS's approval of that plan.

We have serious doubts that the factors cited by the state would justify the withholding of judicial discretion.[14] Equally important, however, the district court's order is wholly inconsistent with the construction the state would have us give to it. Accordingly, we unqualifiedly reject the state's argument. The district court expressly relied on *Carelli* to justify its decision. *Carelli* explicitly rests on the conclusion that a § 1983 action is precluded by the Title IV-D enforcement scheme. Moreover, the district court directly referred to this § 1983 analysis in its description of *Carelli*. See Order at 7. Additionally, the only way the district court could have

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[14] Moreover, such a resolution of the case would be premature at best. The district court cannot properly balance the equities when there is no adequate factual record on which to do so. The defendants attempt to obscure the lack of a sufficient factual record by pointing to the corrective action plan it submitted with its motion to dismiss and listing a multitude of steps the state was promising to take to improve its Title IV-D program. As the plaintiffs point out, there was no evidence before the court that the plans were in fact being implemented, the corrective action plan relied on by the defendants was due to expire six weeks prior to the district court's judgment, and there was no evidence before the court that the CAP had been successfully implemented. In fact, the state's internal audit (initiated after the last HHS audit before the court) suggested that no significant improvement in the state's implementation of its program had been made.

reached the issue of the appropriateness of injunctive relief was to have first decided that the plaintiffs had a valid cause of action. Such a conclusion is clearly inconsistent with its references to and reliance on *Carelli*.

We express no opinion as to the ultimate necessity of the issuance of an injunction on remand. We reverse based solely on the basis of our legal conclusion that a § 1983 action is available to class plaintiffs. We also note that plaintiffs requested more than an injunction. They also requested declaratory relief. The grant of declaratory relief and injunctive relief may require two separate inquiries. We express no opinion as to the appropriateness or inappropriateness of either.

CONCLUSION

The district court's order granting summary judgment to the defendants rests on the erroneous conclusion that a § 1983 remedy for Title IV-D violations is unavailable to plaintiffs. Because Title IV-D creates enforceable rights in the plaintiff class and because the statute does not contain an enforcement scheme sufficiently comprehensive to preclude a § 1983 action, the district court erred in granting defendants judgment as a matter of law.

REVERSED and REMANDED.

KLEINFELD, Circuit Judge, dissenting:

I respectfully dissent.

Congress lodged power in the Secretary of Health and Human Services, and qualified that power by requiring the Secretary to negotiate with the state governments regarding the terms of its exercise. There is nothing in the

law to prevent Governors, Senators and Representatives from telephoning the Secretary to discourage her from overzealous enforcement, which in their view would take too much money away from other important applications.

By creating a private right of action, the majority transfers the power to calibrate the intensity of enforcement efforts from political officials to federal judges. Unlike the Secretary, their decisions cannot be made in a political process, informed by considerations of cost, benefit, and competing claims for money. The people who are to be heard in district court are the lawyers for the parties, not elected officials. Transferring decision making power to the judiciary would be appropriate if there were some law to be enforced for the benefit of a claimant. But there is not. The law at issue says, in substance, that states are supposed to try pretty hard, and do a pretty good job, of enforcing child support, and come up with a plan to try harder if the Secretary thinks they have not been trying hard enough.

What this lawsuit seeks to accomplish is to lodge the power to decide if the states are trying hard enough, and whether their plans to try harder are good enough, in federal judges instead of the Secretary of Health and Human Services. That is contrary to what Congress did. If plaintiffs win the injunction they seek, then probably the district judge will, if the case is handled like many agency continuing injunction cases, appoint a standing master to supervise enforcement. The master will recommend to the district judge how many attorneys and investigators the attorney general should hire and how rapidly the assistant attorneys general should conclude each step of a case. The state will be required to spend however

much money it costs to do what the district court decides would achieve "substantial compliance."

The district judge, unlike the state legislature, will not be balancing the child support enforcement unit's requests for money against the requests for money of all the other state agencies. Nor will the judge consider taxpayers' preferences for keeping more of their money. The judge's audience will be the legal services lawyers, the assistant state attorneys general, and the judges on our court. That is a different audience, presenting different pressures and incentives, from the elected officials of the state, the federal officials, and the state electorate.

Our analytic task is to reconcile *Suter v. Artist M.*, 503 U.S. 347, 348-54, 112 S.Ct. 1360, 1363-65, 118 L.Ed.2d 1 (1992), with *Wilder v. Virginia Hospital Association*, 496 U.S. 498, 500, 110 S.Ct. 2510, 2513, 110 L.Ed.2d 455 (1990), and apply the principles of those cases to the statute in this case. In *Suter*, Congress had provided for federal reimbursement to state foster care and adoption programs. A class action claimed that the state was not making reasonable efforts to prevent removal of children from their families and reunite families after children had been removed, because not enough caseworkers were assigned. The district court, on behalf of the private claimant class, enjoined the state to assign a caseworker to each child within three working days, and the court of appeals had affirmed. *Suter*, 503 U.S. at 348-54, 112 S.Ct. at 1363-65 (1992).

The Supreme Court reversed in *Suter*, on the ground that private individuals had no right to sue for enforcement of the statute. *Id.* at 363, 112 S.Ct. at 1370. The Court

assumed that the children were intended beneficiaries of the statute. *Id.* at 357, 112 S.Ct. at 1367. The Court held that the "reasonable efforts" standard in the act did not "unambiguously confer" enforceable rights. Even if the statutory enforcement mechanism were not so comprehensive as to allow no room for private remedies, the scheme "does not make the reasonable efforts clause a dead letter" without a private remedy. The states had no statutory duty to do anything more than submit a plan for approval of the Secretary of Health and Human Services. *Id.* at 359-62, 112 S.Ct. at 1368-69.

Our case is like *Suter*. The "substantial compliance" standard does not "unambiguously confer" enforceable rights on any individual. The federal standards are for such matters as rates of identification of noncustodial parents of illegitimate children and ratios of staff to caseload in state agencies.[1] Congress, by the use of the word

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[1] Under 42 U.S.C. § 652(a), the Secretary has the duty to establish a unit in the Department of Health and Human Services to perform the following tasks, among others:

> (1) establish such standards for the State programs for locating absent parents, establishing paternity, and obtaining child support and support for the spouse (or former spouse) with whom the absent parent's child is living as he determines to be necessary to assure that such programs will be effective;
>
> (2) establish minimum organizational and staffing requirements for State units engaged in carrying out such programs under plans approved under this part;

"substantial," expressly provides that enforcement need not be 100%. The formulas in the statute and regulations are exceedingly complex, but generally provide for percentages, such as 75%, and say that if the state does what it is supposed to do 75% of the time, that is good enough. *See* 42 U.S.C. §§ 602(a)(27), 652(g); 45 C.F.R. § 305.20(d)(2). The number and elaborateness of the provisions necessarily makes the decision about whether compliance is "substantial" a highly discretionary one. *See* 42 U.S.C.

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(3) review and approve plans for such programs;

(4) evaluate the implementation of State programs established pursuant to such plan, conduct such audits of State programs established under the plan approved under this part as may be necessary. . . . .

(5) assist States in establishing adequate reporting procedures. . . .

(6) maintain records of all amounts collected and disbursed under programs established pursuant to the provisions of this part and of the costs incurred in collecting such amounts;

(7) provide technical assistance to the States to help them establish effective systems for collecting child and spousal support and establish paternity;

(8) receive applications from States for permission to utilize the courts of the United States to enforce court orders for support against absent parents and, upon a finding that (A) another State has not undertaken to enforce the court order of the originating state against the absent parent within a reasonable time, and (B) that utilization of the Federal courts is the only reasonable method of enforcing such order, approve such applications.

§ 652(g)-(h); 45 C.F.R. §§ 305.21, 305.24, 305.98. No custodial parent can say, under this statute, "Congress gave me a right to have the state do something in my case which it is failing to do." Even if the state substantially complied, one out of four custodial parents would find herself or himself within the unfortunate 25%.

Our case is also like *Suter* in that the statute does not become a "dead letter" without private enforcement. The Secretary has the power to take away enormous amounts of money from states which do not do what she says. It is also like *Suter* in that Congress provided that even if the state is not in "substantial compliance," it need not achieve "substantial compliance" to keep the money. The state need only satisfy the Secretary that its "corrective action plan" is "sufficient to achieve substantial compliance." 42 U.S.C. § 603(h); 45 C.F.R. § 305.99. The State governments have no reason to suppose, from the text of the statute, that they have to satisfy federal judges as well as the Secretary of Health and Human Services with their child support collection procedures, or else lose AFDC money.

Wilder is not like the case at bar. In *Wilder*, the federal money at issue was going to private health care providers, not, as in the case at bar, to state governments. *Wilder*, 496 U.S. at 500, 110 S.Ct. at 2513 (1990). Congress said that the amount had to be "reasonable and adequate to meet the costs which must be incurred by efficiently and economically operated facilities." *Id.* (citing 42 U.S.C. § 1396a(a)(13)(A)). The Virginia Hospital Association sued for an injunction to require higher rates, claiming that they were being paid too little money per day. If they

won, the practical effect, unlike the case at bar, would be that the plaintiffs would get more money.

The Supreme Court held in *Wilder* that the health care providers could sue for enforcement under section 1983, because they were a class meant to be benefitted by the statute, and the right was not so "vague and amorphous such that it is beyond the competence of the judiciary to enforce." *Wilder* notes that lack of a private remedy would render the scheme "essentially meaningless," "a dead letter" *Id.* at 509-15, 110 S.Ct. at 2517-20 (internal quotations omitted); *cf. Suter*, 503 U.S. at 359-61, 112 S.Ct. at 1368-69 ("absence of a remedy to private plaintiffs under § 1983 does not make the reasonable efforts clause a dead letter"). The Secretary had "limited oversight," so would not be assuring that the rates were adequate. The state administrative procedure allowed health care providers to challenge only their individual payments, not the method by which the rates were determined. These limitations would make the statutory rate standard, "reasonable and adequate to meet the costs," a "dead letter" if the private right of action were not allowed. *Id.*

Evidently legal services offices around the country have been bringing test cases like the one at bar in numerous circuits, and have won some and lost some. The Eleventh and Sixth Circuits have held that the statute does not create a private cause of action. *Wehunt v. Ledbetter*, 875 F.2d 1558 (11th Cir.1989); *Carelli v. Howser*, 923 F.2d 1208 (6th Cir.1991). The First and Eighth Circuits have found a private cause of action. *Albiston v. Maine Commissioner of Human Services*, 7 F.3d 258 (1st Cir.1993); *Howe v. Ellenbecker*, 8 F.3d 1258 (8th Cir.1993).

The First Circuit case, which held that there was a private right of action, is like *Wilder* and unlike the case at bar in a significant way. The section at issue in *Albiston* entitles custodial parents on welfare to "prompt payment" of the first $50 of each child support payment the state collects from the noncustodial parent. 42 U.S.C. § 652(i). The Secretary defined "prompt payment" as payment within 15 days. 45 C.F.R. § 302.32(f)(2). Maine was taking two to six months to send the custodial parents their $50 checks. The court held that the custodial parents had standing to sue the Maine Commissioner to get their $50 pass through payments. The First Circuit found that a different statute did not give rise to a private right of action, where the duties it imposed were on the Secretary to make the states do a good job, rather than on the states, a situation more analogous to the case at bar. *Stowell v. Ives*, 976 F.2d 65 (1st Cir.1992).

Albiston is like *Wilder* in that there was (1) a standard capable of judicial application, (2) a law benefitting the individuals bringing the lawsuit, and (3) the claim by their lawyer would cause money to which they were entitled to be paid to the members of the class represented. It is also like *Wilder* in that, if plaintiffs won, they would get money.

By contrast, in the case at bar, if the nominal clients asked their lawyers what was in it for them if they won, their lawyers would have to tell them that win or lose, they could not be assured of any money. Their lawyers ask for a declaratory judgment that Arizona is not in "substantial compliance," and an injunction requiring "affirmative measures sufficient to achieve as well as

sustain substantial compliance." They seek attorneys' fees, but no money for their clients.

Even if the plaintiffs won, and even if the district judge or special master turned out to be a far better administrator of the child support enforcement division than the state Attorney General, no particular custodial parent could be assured of a dollar more than he or she gets now. A substantially complying child support enforcement unit would still fail to collect from a noncustodial parent who could not be located, or who was dead, unable to pay, or successful in avoiding collection attempts. Most of us who, as attorneys, have attempted collection work for clients have sometimes failed, and few of us have collected 100% of the money due 100% of the time.

The clients in this litigation provide a platform on which their lawyers can stand to have their voices heard in the administrative decisionmaking for the agency, and to collect attorneys' fees. This is what legal services lawyers call "impact litigation," designed to change social policy, not to get something for a client. *Cf. Snake River Farmers Assn. v. Department of Labor*, 9 F.3d 792, 798 (9th Cir.1993). By contrast, in the First Circuit case, if the very poor clients asked "what's in it for me if we win," the lawyers could say "$50, right away, for each of you." Likewise, in *Wilder*, the lawyers could tell their clients that if they won, they would get higher fees.

The absence of any assured private benefit from the remedy suggests that no private remedy was intended by

Congress. Compare the proposition, in the law of standing, that "it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.' " *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559-61, 112 S.Ct. 2130, 2136, 119 L.Ed.2d 351 (1992). *Suter* says that "the burden is on respondents to demonstrate that Congress intended to make a private remedy available." *Suter*, 503 U.S. at 363, 112 S.Ct. at 1370. *Wilder* says that a person can sue under § 1983 unless that statute does not create an enforceable right under § 1983, as where "the interest the plaintiff asserts is 'too vague and amorphous' such that it is 'beyond the competence of the judiciary to enforce.' " *Wilder*, 496 U.S. at 509, 110 S.Ct. at 2517. Where the lawsuit would not produce a probable concrete benefit for the plaintiff, we can infer that Congress did not create a private right of action for that plaintiff. This factual distinction distinguishes *Suter* from *Wilder* in a manner which makes sense of both cases.

Plaintiffs' lawyers do not, in their complaint, ask for an award of money to their clients. Instead, they ask for a "declaratory judgment determining that operation of the Arizona Title IV-D program violates controlling substantive provisions of federal law creating rights," and for a permanent injunction with continuing supervision to bring about substantial compliance.

Plaintiffs did not sue the Secretary, and claim that she is not performing her duty to muscle the state into substantial compliance. Yet Congress gave to the Secretary, not the courts, the authority and discretion to decide whether state governments were substantially complying, and to negotiate plans to bring them into substantial compliance if they were not. Inferring a private right of

action, as the majority opinion does, subverts this scheme, and gives the district courts power parallel or superior to the Secretary's to supervise state child support enforcement divisions. Congress established a political process, not a judicial one, to manage this administrative task.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

CATHY FREESTONE, et al., Plaintiffs, vs. CHARLES E. COWAN, etc., Defendant.	No. CIV 93-100 TUC ACM ORDER (Filed Aug. 12, 1993)

I. OVERVIEW:

Pending before the Court is Defendant's Motion to Dismiss this case. The Court held a hearing in regards to this motion on July 26, 1993.

II. FACTS:

The plaintiffs are all mothers who claim to be entitled to receive child support enforcement pursuant to Title IV-D of the Social Security Act, 42 U.S.C. § 651 *et seq.* (Title IV-D). The Defendant is the head of the Arizona Department of Economic Security and, in his official capacity, is in charge of the state Title IV-D program. Plaintiffs allege that the defendant failed to comply with federal statutes and regulations which require the defendant to provide efficient services to locate absent parents, establish paternity, establish support obligations through court orders, and enforce existing support orders. Plaintiffs filed this action under 42 U.S.C. § 1983, requesting the Court to

declare the state program deficient in following the federal statutory requirements. They further request a permanent injunction prohibiting the continued practice and requiring the program to substantially comply with the mandates of federal law.

One of the many programs contained in the Social Security Act (42 U.S.C. §§ 301 *et seq.*) is the Aid to Families with Dependent Children (Title IV-A) program, 42 U.S.C. §§ 601 *et seq.* In 1975, Congress amended the Social Security Act by adding Title IV-D. Once a state chooses to participate in Title IV-A, it is then required to provide programs for establishment of paternity and child support as well as enforcement in substantial compliance with the provisions of Title IV-D. 42 U.S.C. § 602(a)(27).

To receive federal funds, state IV-D plans must be approved by the Secretary of Health and Human Services (H.H.S.). 42 U.S.C. § 652(a)(3). Subsequent to plan approval, H.H.S. is required to audit a state's program at least once every three years to ascertain a state's compliance with IV-D requirements. 42 U.S.C. § 652(a)(4). If an audit ascertains that a state has failed to substantially comply with Title IV-D requirements, H.H.S. must reduce the state's funding based upon a predetermined formula. 42 U.S.C. § 603(h). Penalties may be suspended if a state undertakes corrective action. 45 C.F.R. § 305.99.

Of all the programs encompassed under the umbrella of the Social Security Act, only the IV-D program has, by legislative command, a specific executive enforcement unit. The Office of Child Support Enforcement (O.C.S.E.) was separately created by the Secretary of H.H.S. to carry

out regulatory duties under Title IV-D. O.C.S.E.'s functions as set forth by statute are:

> (1) establish such standards for State programs for locating absent parents, establishing paternity, and obtaining child support and support for the spouse (or former spouse) with whom the absent parent's child is living as he determines to be necessary to assure that such programs will be effective;
>
> (2) establish minimum organizational and staffing requirements for State units engaged in carrying out such programs under plans approved under this part;
>
> (3) review and approve State plans for such programs;
>
> (4) evaluate the implementation of State programs established pursuant to such plan, conduct such audits of State programs established under the plan approved under this part as may be necessary to assure their conformity with the requirements of this part, and, not less often than once every three years (or not less often than annually in the case of any State to which a reduction is being applied under section 603(h)(1) of this title, or which is operating under a corrective action plan in accordance with section 603(h)(2) of this title), conduct a complete audit of the programs established under such plan in each State and determine for the purposes of the penalty provision of section 603(h) of this title whether the actual operation of such programs in each State conforms to the requirements of this part[.]

42 U.S.C. § 652(a)(1)-(4).

The Secretary has also promulgated implementing regulations for this regulatory and enforcement authority. *See* 45 C.F.R. §§ 301 *et seq.* For additional details about the Title IV-D program see *Wehunt v. Ledbetter,* 875 F.2d 1558, 1568-75 (11th Cir. 1989), *cert. den. Brown v. Ledbetter,* 110 S.Ct. 1472 (1990) (Clark, J. dissent), and *Carelli v. Howser,* 923 F.2d 1208 (6th Cir. 1991).

III. DISCUSSION:

Defendant brought this Motion to Dismiss. The Court will treat this Motion to Dismiss as a Motion for Summary Judgment. *See* Rule 12(c), Federal Rules of Civil Procedure; *Fort Vancouver Plywood Co. v. U.S.,* 747 F.2d 547, 552 (9th Cir. 1984).

Defendant's arguments are too innumerable to mention here. For purposes of its analysis, the Court will focus on three of the defendant's arguments: 1) That, under the analysis of *Wehunt,* the recipients of the Title IV-D services were not the intended beneficiaries of the Act and cannot maintain this action; 2) that, under the analysis of *Mason v. Bradley,* 789 F.Supp. 273 (N.D.Ill. 1992), there are no mandatory requirements upon the state and plaintiffs are not the intended beneficiaries; 3) that, even if the Court finds that the plaintiffs are the intended beneficiaries, the *Carelli* rationale bars an action under § 1983 because the plaintiffs' complaints are the subject of a pending federal audit. The Court will address these arguments in the above order.

1. Whether the Plaintiffs are the Intended Beneficiaries:

Wehunt also was a § 1983 action against a state's Title IV-D program which was brought by recipients of the state program. In *Wehunt,* the majority held that the plaintiffs were not the intended beneficiaries and had no enforceable right under § 1983. *See Wehunt,* 875 F.2d at 1563-68. This Court declines to follow the holding in *Wehunt.* At the outset, this Court notes that the majority in *Wehunt* appears to have combined two separate and distinct tests. The *Wehunt* majority first explained the test of whether a cause of action exists under § 1983. *Id.* at 1563. The majority then combined that test with the test described in *Cort v. Ash,* 422 U.S. 66, 95 S.Ct. 2080, 45 L.Ed. 26 (1975). It appears that the Supreme Court treats the tests of whether a cause of action exists under § 1983 and the *Cort* test as two separate and distinct analyses. *See, e.g., Suter v. Artist,* 112 S.Ct. 1360 (1992). The *Cort* test is to determine whether an implied right of action for private enforcement exists. *See Id.* at 1370. While there may be some similarities between the two tests, these two tests cannot be combined to determine whether an action exists under § 1983.

This Court agrees with the analyses set forth under the *Wehunt* dissent and in *Carelli* in holding that the plaintiffs are the intended beneficiaries of Title IV-D. Both *Carelli* and the *Wehunt* dissent detail the specific provisions of Title IV-D which provide services for people such as the plaintiffs. *See Carelli,* 923 F.2d at 1209-12; *Wehunt,* 875 F.2d at 1568-75 (Clark dissent). Although the taxpayer may be an intended beneficiary under Title IV-D, it appears that Congress, through the provisions of the Act,

also wanted people such as the plaintiffs to be intended beneficiaries. Therefore, the Court finds that the plaintiffs are intended beneficiaries under Title IV-D.

2. Whether the Recent Cases of *Suter* and *Mason* Apply to Preclude such an Action:

The recent case of *Suter* involved another provision of the Social Security Act. The Supreme Court held that Adoption Assistance and Child Welfare Act did not create rights enforceable in an action under § 1983, nor did it create an implied private cause of action. *Suter*, 112 S.Ct. at 1365-70. In so holding, the Supreme Court reasoned that one clause in the Act which required "reasonable efforts" to be made in keeping a child in his or her home failed to confer the child beneficiaries a right to enforce the clause. *Id.*

The case of *Mason v. Bradley*, 789 F.Supp. 273 (N.D.Ill. 1992), was a case which applied *Suter* in holding that the plaintiff had no right of action under § 1983. In *Mason*, the district court held that Title IV-D did not require the state program to provide effective services to *all* AFDC applicants. *Mason*, 789 F.Supp. at 276. The *Mason* Court focused on the fact that full compliance with the requirements of Title IV-D was not required, and, therefore, the plaintiff had no enforceable right to such services. *Id.* at 277.

This Court refuses to follow the *Mason* rationale for two reasons. First, in comparing the statute in question in *Suter* with Title IV-D, it is apparent that Title IV-D has several provisions which serviced the intended beneficiaries. In the case of *Suter*, the petitioners essentially relied

on one clause contained within the Adoption Assistance and Child Welfare Act of 1980. *See Suter*, 112 S.Ct. at 1365, 1367. In contrast, the plaintiffs here, as do the plaintiffs in other Title IV-D cases, rely upon numerous provisions to assert their right of action. *See Carelli, supra* and *Wehunt, supra*. Second, this Court questions whether the *Mason* rationale would be applicable in the Ninth Circuit. The *Mason* court stated, "[t]here is no clear requirement that *every* applicant be provided with prompt child support services, and Mason has no enforceable right to such services." *Mason*, 789 F.Supp. at 277 (emphasis added). Ninth Circuit case law indicates that if the requested remedy simply increases the chances of the plaintiff's remedy, then the plaintiff has standing to bring the action. *See Huntington Branch, N.A.A.C.P. v. Town of Huntington*, 689 F.2d 391, 394 (9th Cir.), *cert. den., Town of Huntington v. Huntington Branch, N.A.A.C.P.*, 103 S.Ct. 1523 (1982). Therefore, this Court refuses to follow the rationale in *Mason*.

C. Whether the Doctrine Enunciated in *Carelli* Applies in this Case:

Carelli involved facts substantially similar to the case before this Court. In *Carelli*, the plaintiffs brought a § 1983 action requesting that the court order the state program to substantially comply with federal law. In *Carelli*, the court found that Congress had foreclosed the right to bring a § 1983 action by implementing a federal auditing system. *Carelli*, 923 F.2d at 1212-1216. In short, the *Carelli* court found that the relief sought was merely a "hurry-up" order by the plaintiffs for relief which the audit had

already revealed and HHS had already requested. *Id.* at 1215.

The Court finds the reasoning in *Carelli* to be applicable to the case at bar. *Carelli* involved a program in which a previous audit had determined the state program *not* to be in compliance. *Carelli,* 923 F.2d at 1215. A subsequent audit revealed that the Ohio program still was not in compliance. *Id.* Therefore, the OCSE imposed a penalty upon the state. *Id.* At the time the *Carelli* plaintiffs stood before the court, the state was attempting to implement corrective measures.

The case before this Court presents a similar situation. Apparently, the OCSE conducted an audit on the Arizona program back in 1985 and found the program to be lacking. The state proposed some corrective programs, which were approved by the OCSE. The OCSE did not impose a penalty upon the Arizona program. The OCSE conducted another audit in 1989, and found the state program to be lacking. *See* Defendant's Motion to Dismiss, Exhibits Attached, filed 4/28/93. The OCSE again found the Arizona program to be lacking, but accepted Arizona's corrective proposals. Arizona is attempting to correct the deficiencies. The details of the audit are attached to the Defendant's Motion to Dismiss. In the case before this Court, much like in *Carelli,* the plaintiffs based a large portion of their complaint upon the results of an audit. In the case before this Court, much like in *Carelli,* the plaintiffs seek a § 1983 action requesting that the state program follow the federal mandates.

At the hearing, the plaintiffs placed great emphasis on the case of *Withrow v. Concannon,* 942 F.2d 1385 (9th

Cir. 1991). *Withrow* involved the Food Stamp and Medicaid portions of the Social Security Act in regards to the Aid to Families with Dependent Children (AFDC). In *Withrow,* the statute provided for the potential cutting off of funds if the state program was not in substantial compliance with the federal requirements. *See Withrow,* 942 at 1386-1387. The plaintiffs requested an injunction requiring the defendants to hold hearings and issue administrative decisions under the AFDC within the federally prescribed time limits. The Ninth Circuit reversed the lower court's granting of summary judgment, holding that the mandatory language regarding the state reaching a decision regarding a person's entitlement was separate and distinct from the "substantial compliance" provision. *Id.* at 1387.

This Court believes that there are two primary distinctions between *Withrow* and the case before this Court. First, *Withrow* involved a § 1983 action alleging statutory *and* constitutional violations. Underlying the *Withrow* case was basic subsistence and constitutional concerns as elicited by *Goldberg v. Kelly,* 90 S.Ct. 1011 (1970). The case at bar does not allege any constitutional concerns, but instead involves purely statutory concerns. The second distinction is somewhat related to the first: *Carelli* makes a distinction between "re-capture" and a "benefits" program. The *Carelli* court stated:

> In the typical benefits program, Congress provides funds to states to be distributed, and the primary aim of legislative and executive oversight is to see that the funds are properly accounted for and distributed to persons meeting the eligibility criteria. The role of the states,

> to some degree at least, is passive in that they serve as a conduit for the funds to be distributed. The responsibility of a participating state under Title IV-D is vastly different. They have to set up the machinery to administer and provide the *services* mandated and have the *full* responsibility for recapture of funds.

Carelli, 923 F.2d at 1214 (emphasis in original). Obviously, *Withrow* is a benefits program, whereas *Carelli* is a recapture program.

The Court agrees with *Carelli* in that its ruling is similar to an abstention order. Such an action "is delayed pending the outcome of another proceeding, a proceeding that we feel Congress intended under these circumstances to take precedence." *Carelli* at 1216.

IV. CONCLUSION:

Based upon the foregoing,

IT IS ORDERED THAT the Defendant's Motion for Summary Judgment is hereby GRANTED.

IT IS FURTHER ORDERED THAT Judgment be entered accordingly.

Dated this 12th day of August, 1993.

/s/ A. C. Marquez
ALFREDO C. MARQUEZ
Senior Judge

APPENDIX C

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CATHY FREESTONE, individually, on behalf of their minor children and on behalf of all others similarly situated, SUSAN HARRINGTON, individually, on behalf of their minor children and on behalf of all others similarly situated, SONYA MADRID, individually, on behalf of their minor children and on behalf of all others similarly situated, JUDITH ROGERS, individually, on behalf of their minor children and on behalf of others similarly situated, ESPERANZA LAUSTAUNAU, individually, on behalf of their minor children and on behalf of others similarly situated, Plaintiff-Appellants, v. CHARLES E. COWAN, Director, Arizona Department of Economic Security, in his official capacity Defendant-Appellee.	No. 93-16697 D.C. No. CV-93-00100-ACM ORDER (Filed Dec. 12, 1995)

Before: Reinhardt, Thompson and Kleinfeld, Circuit Judges.

Judges Reinhardt and Thompson have voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc. Judge Kleinfeld voted to grant the petition for rehearing and to accept the suggestion for rehearing en banc. The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX D

§ 602. State plans for aid and services to needy families with children; contents; approval by Secretary; records and reports; treatment of earned income advances

(a) Contents. A State plan for aid and services to needy families with children must –

* * *

(27) provide that the State has in effect a plan approved under part D [42 USCS §§ 651 et seq.] and operates a child support program in substantial compliance with such plan;

* * *

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§ 603. Payment to States

* * *

(h) Reduction in amount; child support plan. (1) Notwithstanding any other provision of this Act, if a State's program operated under part D [42 USCS §§ 651 et seq.] is found as a result of a review conducted under section 452(a)(4) [42 USCS § 652(a)(4)] not to have complied substantially with the requirements of such part [42 USCS §§ 651 et seq.] for any quarter beginning after September 30, 1983, and the Secretary determines that the State's program is not complying substantially with such requirements at the time such finding is made, the amounts otherwise payable to the State under this part

[42 USCS §§ 601 et seq.] for such quarter and each subsequent quarter, prior to the first quarter throughout which the State program is found to be in substantial compliance with such requirements, shall be reduced (subject to paragraph (2)) by –

(A) not less than one nor more than two percent, or

(B) not less than two nor more than three percent, if the finding is the second consecutive such finding made as a result of such a review, or

(C) not less than three nor more than five percent, if the finding is the third or a subsequent consecutive such finding made as a result of such a review.

(2)(A) The reductions required under paragraph (1) shall be suspended for any quarter if –

(i) the State submits a corrective action plan, within a period prescribed by the Secretary following notice of the finding under paragraph (1), which contains steps necessary to achieve substantial compliance within a time period which the Secretary finds to be appropriate;

(ii) the Secretary approves such corrective action plan (and any amendments thereto) as being sufficient to achieve substantial compliance; and

(iii) the Secretary finds that the corrective action plan (and any amendment thereto approved by the secretary under clause (ii)), is being fully implemented by the State and that the State is progressing in accordance with the timetable contained in the plan to achieve substantial compliance with such requirements.

(B) A suspension of the penalty under subparagraph (A) shall continue until such time as the Secretary determines that –

(i) the State has achieved substantial compliance,

(ii) the State is no longer implementing its corrective action plan, or

(iii) the State is implementing or has implemented its corrective action plan but has failed to achieve substantial compliance within the appropriate time period (as specified in subparagraph (A)(i)).

(C)(i) In the case of a State whose penalty suspension ends pursuant to subparagraph (B)(i), the penalty shall not be applied.

(ii) In the case of a State whose penalty suspension ends pursuant to subparagraph (B)(ii), the penalty shall be applied as if the suspension had not occurred.

(iii) In the case of a State whose penalty suspension ends pursuant to subparagraph (B)(iii), the penalty shall be applied to all quarters ending after the expiration of the time period specified in such subparagraph (and prior to the first quarter throughout which the State program is found to be in substantial compliance).

(3) For purposes of this subsection, section 402(a)(27) [42 USCS § 602(a)(27)], and section 452(a)(4) [42 USCS § 652(a)(4)], a State which is not in full compliance with the requirements of this part [42 USCS §§ 601 et seq.] shall be determined to be in substantial compliance with such requirements only if the Secretary determines that

any noncompliance with such requirements is of a technical nature which does not adversely affect the performance of the child support enforcement program.

* * *

---

§ 652. Duties of Secretary

(a) Establishment of separate organizational unit; duties. The Secretary shall establish, within the Department of Health and Human Services a separate organizational unit, under the direction of a designee of the Secretary, who shall report directly to the Secretary and who shall –

(1) establish such standards for State programs for locating absent parents, establishing paternity, and obtaining child support and support for the spouse (or former spouse) with whom the absent parent's child is living as he determines to be necessary to assure that such programs will be effective;

(2) establish minimum organizational and staffing requirements for State unit engaged in carrying out such programs under plans approved under this part [42 USCS §§ 651 et seq.];

(3) review and approve State plans for such programs;

(4) evaluate the implementation of State programs established pursuant to such plan, conduct such audits of State programs established under the plan approved under this part [42 USCS §§ 651 et seq.] as may be

necessary to assure their conformity with the requirements of this part [42 USCS §§ 651 et seq.], and, not less often than once every three years (or not less often than annually in the case of any State to which a reduction is being applied under section 403(h)(1) [42 USCS § 603(h)(1)], or which is operating under a corrective action plan in accordance with section 403(h)(2) [42 USCS § 603(h)(2)]), conduct a complete audit of the programs established under such plan in each State and determine for the purposes of the penalty provision of section 403(h) [42 USCS § 603(h)] whether the actual operation of such programs in each State conforms to the requirements of this part [42 USCS §§ 651 et seq.];

(5) assist States in establishing adequate reporting procedures and maintain records of the operations of programs established pursuant to this part [42 USCS §§ 651 et seq.] in each State;

(6) maintain records of all amounts collected and disbursed under programs established pursuant to the provisions of this part [42 USCS §§ 651 et seq.] and of the costs incurred in collecting such amounts;

(7) provide technical assistance to the States to help them establish effective systems for collecting child and spousal support and establishing paternity;

(8) receive applications from States for permission to utilize the courts of the United States to enforce court orders for support against absent parents and, upon a finding that (A) another State has not undertaken to enforce the court order of the originating State against the

absent parent within a reasonable time, and (B) that utilization of the Federal courts is the only reasonable method of enforcing such order, approve such applications;

(9) operate the Parent Locator Service established by section 453 [42 USCS § 653]; and

(10) not later than three months after the end of each fiscal year, beginning with the year 1977, submit to the Congress a full and complete report on all activities undertaken pursuant to the provisions of this part [42 USCS §§ 651 et seq.], which report shall include, but not be limited to, the following:

(A) total program costs and collections set forth in sufficient detail to show the cost to the States and the Federal Government, the distribution of collections to families, State and local governmental units, and the Federal Government; and an identification of the financial impact of the provisions of this part [42 USCS §§ 651 et seq.];

(B) costs and staff associated with the Office of Child Support Enforcement;

(C) the following data, with the data required under each clause being separately stated for cases where the child is receiving aid to families with dependent children (or foster care maintenance payments under part E [42 USCS §§ 670 et seq.]), cases where the child was formerly receiving such aid or payments and the State is continuing to collect support assigned to it under section 402(a)(26) or 471(a)(17) [42 USCS §§ 602(a)(26), 671(a)(17)], and all other cases under this part [42 USCS §§ 651 et seq.]

(i) the total number of cases in which a support obligation has been established in the fiscal year for which the report is submitted, and the total amount of such obligations;

(ii) the total number of cases in which a support obligation has been established, and the total amount of such obligations;

(iii) the number of cases described in clause (i) in which support was collected during such fiscal year, and the total amount of such collections;

(iv) the number of cases described in clause (ii) in which support was collected during such fiscal year, and the total amount of such collections; and

(v) the number of child support cases filed in each State in such fiscal year, and the amount of the collections made in each State in such fiscal year, on behalf of children residing in another State or against parents residing in another State;

(D) the status of all State plans under this part [42 USCS §§ 651 et seq.] as of the end of the fiscal year last ending before the report is submitted, together with an explanation of any problems which are delaying or preventing approval of State plans under this part [42 USCS §§ 651 et seq.];

(E) data, by State, on the use of the Federal Parent Locator Service, and the number of locate requests submitted without the absent parent's social security account number;

(F) the number of cases, by State, in which an applicant for or recipient of aid under a State plan approved under

part A [42 USCS §§ 601 et seq.] has refused to cooperate in identifying and locating the absent parent and the number of cases in which refusal so to cooperate is based on good cause (as determined in accordance with the standards referred to in section 402(a)(26)(B)(ii) [42 USCS § 602(a)(26)(B)(ii)]);

(G) data, by State, on the use of Federal courts and on use of the Internal Revenue Service for collections, the number of court orders on which collections were made, the number of paternity determinations made and the number of parents located, in sufficient detail to show the cost and benefits to the States and to the Federal Government;

(H) the major problems encountered which have delayed or prevented implementation of the provisions of this part [42 USCS §§ 651 et seq.] during the fiscal year last ending prior to the submission of such report; and

(I) the amount of administrative costs which are expended in each functional category of expenditures, including establishment of paternity.

The information contained in any such report under subparagraph (A) shall specifically include (i) the total amount of child support payments collected as a result of services furnished during the fiscal year involved to individuals under section 454(6) [42 USCS § 654(6)], (ii) the cost to the States and to the Federal Government of furnishing such services to those individuals, and (iii) the extent to which the furnishing of such services was successful in providing sufficient support to those individuals to assure that they did not require assistance under

the State plan approved under part A [42 USCS §§ 601 et seq.].

(b) Certification of child support obligations to Secretary of Treasury for collection. The Secretary shall, upon the request of any State having in effect a State plan approved under this part [42 USCS §§ 651 et seq.], certify to the Secretary of the Treasury for collection pursuant to the provisions of section 6305 of the Internal Revenue Code of 1954 [26 USCS § 6305] the amount of any child support obligation (including any support obligation with respect to the parent who is living with the child and receiving aid under the State plan approved under part A [42 USCS §§ 601 et seq.]) which is assigned to such State or is undertaken to be collected by such State pursuant to section 454(6) [42 USCS § 654(6)]. No amount may be certified for collection under this subsection except the amount of the delinquency under a court or administrative order for support and upon a showing by the State that such State has made diligent and reasonable efforts to collect such amounts utilizing its own collection mechanisms, and upon an agreement that the State will reimburse the Secretary of the Treasury for any costs involved in making the collection. All reimbursements shall be credited to the appropriation accounts which bore all or part of the costs involved in making the collections. The Secretary after consultation with the Secretary of the Treasury may, be regulation, establish criteria for accepting amounts for collection and for making certification under this subsection including imposing such limitations on the frequency of making such certifications under this subsection.

(c) Payments to States. The Secretary of the Treasury shall from time to time pay to each State for distribution in accordance with the provisions of section 457 [42 USCS § 657] the amount of each collection made on behalf of such State pursuant to subsection (b).

(d) Child support management information system. (1) Except as provided in paragraph (3), the Secretary shall not approve the initial and annually updated advance automated data processing planning document, referred to in section 454(16) [42 USCS § 454(16)], unless he finds that such document, when implemented, will generally carry out the objectives of the management system referred to in such subsection, and such document –

(A) provides for the conduct of, and reflects the results of, requirements analysis studies, which include consideration of the program mission, functions, organization, services, constraints, and current support, of, in, or relating to, such system,

(B) contains a description of the proposed management system referred to in section 655(a)(1)(B) [42 USCS § 655(a)(1)(B)], including a description of information flows, input data, and output reports and uses,

(C) sets forth the security and interface requirements to be employed in such management system,

(D) describes the projected resource requirements for staff and other needs, and the resources available or expected to be available to meet such requirements,

(E) contains an implementation plan and backup procedures to handle possible failures,

(F) contain a summary of proposed improvement of such management system in terms of qualitative and quantitative benefits, and

(G) provides such other information as the Secretary determines under regulation is necessary.

(2)(A) The Secretary shall through the separate organizational unit established pursuant to subsection (a), on a continuing basis, review, assess, and inspect the planning, design, and operation of, management information systems referred to in section 455(a)(1)(B) [42 USCS § 655(a)(1)(B)], with a view to determining whether, and to what extent, such systems meet and continue to meet requirements imposed under paragraph (1) and the conditions specified under section 454(16) [42 USCS § 654(16)].

(B) If the Secretary finds with respect to any statewide management information system referred to in section 455(a)(1)(B) [42 USCS § 655(a)(1)(B)] that there is a failure substantially to comply with criteria, requirements, and other undertakings, prescribed by the advance automated data processing planning document theretofore approved by the Secretary with respect to such system, then the Secretary shall suspend his approval of such document until there is no longer any such failure of such system to comply with such criteria, requirements, and other undertakings so prescribed.

(3) The Secretary may waive any requirement of paragraph (1) or any condition specified under section 454(16) [42 USCS § 654(16)] with respect to a State if –

(A) the State demonstrates to the satisfaction of the Secretary that the State has an alternative system or systems that enable the state, for purposes of section 403(h) [42 USCS § 603(h)], to be in substantial compliance with other requirements of this part [42 USCS §§ 651 et seq.]; and

(B)(i) the waiver meets the criteria of paragraphs (1), (2), and (3) of section 1115(c) [42 USCS § 1315(c)(1)-(3)], or

(ii) the State-provides assurance to the Secretary that steps will be taken to otherwise improve the State's child support enforcement program.

(e) Technical assistance to States. The Secretary shall provide such technical assistance to States as he determines necessary to assist States to plan, design, develop, or install and provide for the security of, the management information systems referred to in section 455(a)(1)(B) [42 USCS § 655(a)(1)(B)].

(f) Inclusion of medical support in child support orders. The Secretary shall issue regulations to require that State agencies administering the child support enforcement program under this part [42 USCS §§ 651 et seq.] petition for the inclusion of medical support as part of any child support order whenever health care coverage is available to the absent parent at a reasonable cost. Such regulation shall also provide for improved information exchange between such State agencies and the State agencies administering the State medicaid programs under title XIX [42 USCS §§ 1396 et seq.] with respect to the availability of health insurance coverage.

(g) Standards for State paternity establishment programs. (1) A State's program under this part [42 USCS §§ 651 et seq.] shall be found, for purposes of section 403(h) [42 USCS § 603(h)], not to have complied substantially with the requirements of this part [42 USCS §§ 651 et seq.] unless, for any fiscal year beginning on or after October 1, 1994, its paternity establishment percentage for such fiscal year is based on reliable data and (rounded to the nearest whole percentage point) equals or exceeds –

(A) 75 percent;

(B) for a state with a paternity establishment percentage of not less than 50 percent but less than 75 percent for such fiscal year, the paternity establishment percentage of the State for the immediately preceding fiscal year plus 3 percentage points;

(C) for a State with a paternity establishment percentage of not less than 45 percent but less than 50 percent for such fiscal year, the paternity establishment percentage of the State for the immediately preceding fiscal year plus 4 percentage points;

(D) for a State with a paternity establishment percentage of not less than 40 percent but less than 45 percent for such fiscal year, the paternity establishment percentage of the State for the immediately preceding fiscal year plus 5 percentage points; or

(E) for a State with a paternity establishment percentage of less than 40 percent for such fiscal year, the paternity establishment percentage of the State for the immediately preceding fiscal year plus 6 percentage points.

(2) For purposes of this section –

(A) the term "paternity establishment percentage" means, with respect to a State (or all States, as the case may be) for a fiscal year, the ratio (expressed as a percentage) that the total number of children –

(i) who have been born out of wedlock,

(ii) (I) except as provided in the last sentence of this paragraph, with respect to whom aid is being paid under the State's plan approved under part A or E [42 USCS §§ 601 et seq. or §§ 670 et seq.] in the fiscal year or, at the option of the State, as of the end of such year, or (II) with respect to whom services are being provided under the State's plan approved under this part [42 USCS §§ 651 et seq.] in the fiscal year or, at the option of the State, as of the end of such year pursuant to an application submitted under section 454(6) [42 USCS § 654(6)], and

(iii) the paternity of whom has been established or acknowledged,

bears to the total number of children who were born out of wedlock and (except as provided in such last sentence) with respect to whom aid was being paid under the State's plan approved under part A or E [42 USCS §§ 601 et seq. or §§ 670 et seq.] as of the end of the preceding fiscal year or with respect to whom services were being provided under the State's plan approved under this part [42 USCS §§ 651 et seq.] as of the end of the preceding fiscal year pursuant to an application submitted under section 454(6) [42 USCS § 654(6)]; and

(B) the term "reliable data" means the most recent data available which are found by the Secretary to be reliable for purposes of this section.

For purposes of subparagraph (A), the total number of children shall not include any child who is a dependent child by reason of the death of a parent unless paternity is established for such child or any child with respect to whom an applicant or recipient is found to have good cause for refusing to cooperate under section 402(a)(26) [42 USCS § 602(a)(26)] or any child with respect to whom the State agency administering the plan under part E [42 USCS §§ 670 et seq.] determines (as provided in section 454(4)(B) [42 USCS § 654(4)(B)]) that it is against the best interests of such child to do so.

(3)(A) The requirements of this subsection are in addition to and shall not supplant any other requirement (that is not inconsistent with such requirements) established in regulations by the Secretary for the purpose of determining (for purposes of section 403(h) [42 USCS § 603(h)]) whether the program of a State operated under this part [42 USCS § 651 et seq.] shall be treated as complying substantially with the requirements of this part [42 USCS § 651 et seq.].

(B) The Secretary may modify the requirements of this subsection to take into account such additional variables as the Secretary identifies (including the percentage of children born out-of-wedlock in a State) that affect the ability of a State to meet the requirements of this subsection.

(C) The Secretary shall submit an annual report to the Congress that sets forth the data upon which the paternity establishment percentages for States for a fiscal year are based, lists any additional variables the Secretary has

identified under subparagraph (A), and describes State performance in establishing paternity.

(h) Requirement of prompt State response to requests for child support assistance. The standards required by subsection (a)(1) shall include standards establishing time limits governing the period or periods within which a State must accept and respond to requests (from States, jurisdictions thereof, or individuals who apply for services furnished by the State agency under this part [42 USCS §§ 651 et seq.] or with respect to whom an assignment under section 402(a)(26) [42 USCS § 602(a)(26)] is in effect) for assistance in establishing and enforcing support orders, including requests to locate absent parents, establish paternity, and initiate proceedings to establish and collect child support awards.

(i) Requirement of prompt State response to requests for child support assistance. The standards required by subsection (a)(1) shall include standards establishing time limits governing the period or periods within which a State must distribute, in accordance with section 457 [42 USCS § 657], amounts collected as child support pursuant to the State's plan approved under this part [42 USCS §§ 651 et seq.].

APPENDIX E

§ 302.33 Services to individuals not receiving AFDC or title IV-E foster care assistance.

(a) *Availability of Services.* (1) The State plan must provide that the services established under the plan shall be made available to any individual who:

(i) Files an application for the services with the IV-D agency. In an interstate case, only the initiating State may require an application under this section; or

(ii) Is a non-AFDC Medicaid recipient; or

(iii) Has been receiving IV-D services and is no longer eligible for assistance under the AFDC, IV-E foster care, and Medicaid program.

(2) The State may not require an application, other request for services or an application fee from any individual who is eligible to receive services under paragraphs (a)(1)(ii) and (iii) of this section. If an individual receiving services under paragraph (a)(1)(iii) of this section refuses services in response to a notice under paragraph (a)(4) of this section, and subsequently requests services, that individual must file an application and pay an application fee.

(3) The State may not charge fees or recover costs from any individual who is eligible to receive services under paragraph (a)(1)(ii) of this section.

(4) Whenever a family is no longer eligible for assistance under the State's AFDC, IV-E foster care, and Medicaid programs, the IV-D agency must notify the family, within five working days of the notification of ineligibility, that IV-D services will be continued unless the

IV-D agency is notified to the contrary by the family. The notice must inform the family of the consequences of continuing to receive IV-D services, including the available services and the State's fees, cost recovery and distribution policies.

(5) The State must provide all appropriate IV-D services, in addition to IV-D services related to securing medical support, to all individuals who are eligible to receive services under paragraph (a)(1)(ii) of this section unless the individual notifies the State that only IV-D services related to securing medical support are wanted.

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§ 305.20 Effective support enforcement program.

For the purposes of this part and section 403(h) of the Act, in order to be found to have an effective program in substantial compliance with the requirements of title IV-D of the Act:

(a) For any audit period which begins on or after December 23, 1994, a State must meet the IV-D State plan requirements contained in Part 302 of this chapter measured as follows:

* * *

(3) The State must have and use procedures required under the following criteria in at least 75 percent of the cases reviewed for each criterion:

(i) Collection and distribution of support payments, including: Collection and distribution of support payments by the IV-D agency under §§ 302.32(b) and (f); distribution of support collections under § 302.51; and distribution of support collected in title IV-E foster care maintenance cases under § 302.52;

(ii) Establishment of paternity and support orders, including: Establishment of a case under § 303.2(b); services to individuals not receiving AFDC or title IV-E foster care assistance, under §§ 302.33(a)(1) through (4): provision of services in interstate IV-D cases under §§ 303.7(a), (b) and (c)(1) through (6) and (8) through (10); location of non-custodial parents under § 303.3; establishment of paternity under §§ 303.5(a) and (f); guidelines for setting child support awards under § 302.56; and establishment of support obligations under §§ 303.4(d), (e) and (f);

(iii) Enforcement of support obligations, including, in all appropriate cases: Establishment of a case under § 303.2(b); services to individuals not receiving AFDC or title IV-E foster care assistance, under §§ 302.33(a)(1) through (4); provision of services in interstate IV-D cases under §§ 303.7(a), (b) and (c)(1) through (6) and (8) through (10); location of non-custodial parents under § 303.3; enforcement of support obligations under § 303.6, including submitting once a year all appropriate cases in accordance with § 303.6(c)(3) to State and Federal income tax refund offset; and wage withholding under § 303.100. In cases in which wage withholding cannot be implemented or is not available and the non-custodial parent has been located, States must use or attempt to use at least one enforcement technique available under State

law in addition to Federal and State tax refund offset, in accordance with State laws and procedures and applicable State guidelines developed under § 302.70(b) of this chapter;

(iv) Review and adjustment of child support orders, including: establishment of a case under § 303.2(b); services to individuals not receiving AFDC or title IV-E foster care assistance, under §§ 302.33(a)(1) through (4); provision of services in interstate IV-D cases under §§ 303.7(a), (b) and (c)(1) through (6) and (8) through (10); location of non-custodial parents under § 303.3; guidelines for setting child support awards under § 302.56; and review and adjustment of support obligations under § 303.8; and

(v) Medical support, including: establishment of a case under § 303.2(b); services to individuals not receiving AFDC or title IV-E foster care assistance, under §§ 302.33(a)(1) through (4); provision of services in interstate IV-D cases under §§ 303.7(a), (b) and (c)(1) through (6) and (8) through (10); location of non-custodial parents under § 303.3; securing medical support information under § 303.30; and securing and enforcing medical support obligations under § 303.31.

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§ 305.99 Notice and corrective action period.

(a) If a State is found by the Secretary on the basis of the results of the audit described in this part not to comply substantially with the requirements of title IV-D of the Act, as implemented by Chapter III of this title, the Office will notify the State in writing of such finding.

(b) The notice will:

(1) Cite the State for noncompliance, list the unmet audit criteria, apply a penalty and give reasons for the Secretary's finding;

(2) Identify any audit criteria listed in § 305.20(a)(3) of this part that the State met only marginally [that is, in 75 to 80 percent of cases reviewed for criteria in § 305.20(a)(3)];

(3) Specify that the penalty may be suspended if the State meets the conditions specified in paragraph (c) of this section; and

(4) Specify the conditions that result in terminating the suspension of the penalty as specified in paragraph (d) of this section.

(c) The penalty will be suspended for a period not to exceed one year from the date of the notice if the following conditions are met:

(1) Within 60 days of the date of the notice, the State submits a corrective action plan to the appropriate Regional Office which contains a corrective action period not to exceed one year from the date of the notice and which contains steps necessary to achieve substantial compliance with the requirements of title IV-D of the Act;

(2) The corrective action plan and any amendment are:

(i) Approved by the Secretary within 30 days of receipt of the corrective action plan; or

(ii) Approved automatically because the Secretary took no action within the period specified in paragraph(c)(2)(i) of this section; and

(3) The Secretary finds that the corrective action plan (or any amendment to it approved by the Secretary) is being fully implemented by the State and that the State is progressing to achieve substantial compliance with the unmet criteria cited in the notice.

(d) The suspension of the penalty will continue until such time as the Secretary determines that:

(1) The State has achieved substantial compliance with the unmet criteria cited in the notice and maintained substantial compliance with any marginally-met criteria cited in the notice;

(2) During the corrective action period, the State is not implementing its corrective action plan; or

(3) The State has implemented its corrective action plan but has failed to achieve substantial compliance with the unmet criteria cited in the notice and maintain substantial compliance with any marginally-met criteria cited in the notice. For State plan-related criteria, this determination will be made as of the first full three-month period after the corrective action period. For performance indicator-related criteria, this determination will be made as of the first full four quarters following the end of the corrective action period.

(e) A corrective action plan disapproved under paragraph (c) of this section is not subject to appeal.

(f) Only one corrective action period is provided to a State in relation to a given criterion when consecutive findings of noncompliance are made on that criterion.